82-1167

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether law enforcement officers must obtain a search warrant before conducting a chemical field test to determine whether a substance that has lawfully come into their possession and that appears to be cocaine is in fact cocaine.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-9a) is reported at 683 F.2d 296.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 11a) was entered on July 27, 1982. A petition for rehearing was denied on October 14, 1982 (App. B, *infra*, 10a). On December 2, 1982, Justice Blackmun extended the time in which to file a petition for a writ of certiorari to and including January 12, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, respondents were each

convicted of possessing cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in violation of 21 U.S.C. 846. Respondent Bradley Jacobsen was also convicted of assaulting a federal officer, in violation of 18 U.S.C. 111 (App. A, *infra*, 3a).[1] The court of appeals reversed all the narcotics convictions on the ground that evidence obtained in violation of the Fourth Amendment was admitted at trial (App. A, *infra*, 8a).[2]

1. On May 1, 1981, an employee of Federal Express, a private freight carrier, discovered a damaged cardboard box among the packages given to Federal Express for shipment (App. A, *infra*, 1a). Pursuant to a written company policy adopted "because of the possibility of insurance claims" (App. E, *infra*, 17a), a Federal Express supervisor opened the package. Inside the package was a ten-inch-long tube wrapped with gray tape; inside the tube were four transparent plastic bags, one inside the other. The employees removed the bags from the tube and saw that the innermost bag contained a white powder. App. A, *infra*, 1a; App. E, *infra*, 17a.

The Federal Express employees believed the white powder might be an illicit substance, and they notified the Drug Enforcement Administration. They also re-

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[1] Respondent Bradley Jacobsen was sentenced to a term of one year's imprisonment and three years' special parole on the substantive narcotics count, a consecutive term of six months' imprisonment on the assault count, and a concurrent term of one year's imprisonment on the conspiracy count. Respondent Donna Jacobsen was sentenced to a one-year term of imprisonment and a three-year special parole term on the substantive count, and a concurrent one-year prison term on the conspiracy count, but her sentences were suspended and she was placed on three years' probation on the condition that she serve three months in a jail-type facility. App. A, *infra*, 3a n.1.

[2] The court of appeals affirmed Bradley Jacobsen's assault conviction (App. A, *infra*, 8a).

placed the bags in the tube but left them visible from the end of the tube. DEA agents went to the Federal Express office, removed the bags from the tube, and conducted a chemical field test on a small sample of powder from the plastic bags. The test indicated that the powder was cocaine. App. A, *infra*, 1a-2a; App. E, *infra*, 18a.[3]

The DEA agents then rewrapped the package after extracting another sample for further laboratory testing. The package had been addressed to "Mr. D. Jacobs" at an address that the agents ascertained to be respondents' residence. DEA computer files mentioned respondent Bradley Jacobsen in connection with two previous reports of cocaine distribution. On the basis of that information and what they had learned at the Federal Express office, the agents sought and obtained a warrant to search the house to which the package was addressed. App. A, *infra*, 2a; App. E, *infra*, 18a-19a.

On the afternoon of May 1, DEA Agent Lewis, in ordinary clothes, went to respondents' house and delivered the rewrapped package. Respondent Donna Jacobsen signed for the package and accepted it. Approximately one hour later, Agent Lewis returned to the house with the search warrant and several other officers. Respondent Bradley Jacobsen opened the door, and Agent Lewis identified himself as a law enforcement officer. Bradley Jacobsen then slammed the door into Agent Lewis's face, breaking his glasses and knocking him down, and yelled: "It's the police—flush it." App. A, *infra*, 2a; App. E, *infra*, 19a; Tr. 43.

The officers forced the door open and entered the house. They found traces of cocaine, cocaine paraphernalia, and burned remnants of the package. App. A, *infra*, 2a.

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[3] The package was later found to contain six and one-half ounces of cocaine, with a street value of over $72,000 (Tr. 441). "Tr." refers to the trial transcript.

2. Respondents unsuccessfully moved to suppress the evidence found in their house. The district court noted that respondents "concede that the initial search of the package and discovery of the cocaine by the Federal Express employees was not proscribed by the fourth amendment because it was done by private persons" (App. D, *infra*, 13a). The district court found that by the time the DEA agents arrived at the Federal Express office, "the Federal Express employees had already opened the box and removed the bags containing the white powder from the gray tube" (*id.* at 15a).

The district court ruled that "when a private person makes an initial search of a closed container and then turns the container over to government authorities, the reopening of the container does not constitute a separate search requiring a warrant" (App. D, *infra*, 14a-15a). In this case, the court noted, "[t]he only investigation of the contents of the box beyond the investigation by Federal Express employees was the field test by the DEA agents" (*id.* at 15a). The district court then rejected as "without foundation" respondents' contention that "when federal agents lawfully receive possession of a substance they believe to be contraband, they must obtain a search warrant before a field test to verify the chemical content of the contraband may be performed" (*ibid.*).

3. The court of appeals held that the district court erred in not suppressing the evidence found in respondents' house. The court of appeals noted that respondents did not contend that the Federal Express employees' inspection of the package violated the Fourth Amendment but only that "the federal agents' search exceeded the scope of the private search" (App. A, *infra*, 4a). The court ruled that "[t]he private search in this case exposed bags of powder, but [respondents'] initial reasonable expectation that the package's con-

tents would remain private was not entirely frustrated by the private search" (*id.* at 6a).

Specifically, the court of appeals held that the agents' field testing of a sample of the powder violated the Fourth Amendment. The court of appeals acknowledged that this holding was in direct conflict with *United States* v. *Barry*, 673 F.2d 912 (6th Cir. 1982), cert. denied, No. 81-6942 (Oct. 12, 1982), which the court below described as presenting "almost identical circumstances" (App. A, *infra*, 6a n.4).[4] The court of appeals relied exclusively on *Walter* v. *United States*, 447 U.S. 649 (1980), in which four Justices of this Court, with a fifth, Justice Marshall, concurring in the judgment, concluded that federal agents violated the Fourth Amendment when they failed to obtain a warrant before viewing, with the aid of a projector, films that private parties had lawfully acquired and delivered to them but had not themselves viewed on a projector. The court of appeals declared that "[t]he invasion of privacy and collection of inculpatory evidence involved in testing unidentified substances is parallel to the investigation and intrusion involved in screening a film" (App. A, *infra*, 7a n.4). It explained (*id.* at 6a):

> The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the ob-

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[4] The court of appeals also acknowledged that its decision was in conflict with *People* v. *Adler*, 50 N.Y.2d 730, 409 N.E.2d 888, 431 N.Y.S.2d 412, cert. denied, 449 U.S. 1014 (1980), and recognized that the Tenth Circuit had upheld a field test in similar circumstances. App. A, *infra*, 6a-7a n.4, citing *United States* v. *Andrews*, 618 F.2d 646, cert. denied, 449 U.S. 824 (1980).

jects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder.

The court of appeals therefore concluded that, because none of the recognized exceptions to the warrant requirement applied, the DEA agents violated the Fourth Amendment when they conducted the field test without a warrant. The court then noted that "[t]he finding of cocaine in a package being sent to [respondents'] home was the core of the affidavit which justified the issuance of the warrant to search the * * * home" (App. A, *infra*, 8a), and it asserted that "[w]ithout the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe [respondents] possessed cocaine in their home" (*ibid.*).

Senior District Judge Becker, sitting by designation, concurred specially "with serious reservations" (App. A, *infra*, 9a). He indicated that he believed the decision in *Walter* required the result reached by the court of appeals but that he agreed generally with the views expressed by Justice Blackmun's dissent in *Walter*. The government's petition for rehearing was denied, with three judges voting to rehear the case en banc (App. B, *infra*, 10a).

REASONS FOR GRANTING THE PETITION

The court of appeals has plainly erred, and its error will impose substantial and wholly unnecessary burdens on law enforcement efforts. Nothing in the decisions of this Court or in Fourth Amendment principles requires that officers obtain a warrant before conducting a test that can reveal only whether or not a substance is cocaine. Moreover, the court of appeals' decision casts a shadow over the validity of one of the most routine and essential practices in drug law enforcement—a practice that has been heretofore employed on literally thou-

sands of occasions without any judicial suggestion of impropriety until this case. Further review is therefore warranted.

1. A person may "claim the protection of the Fourth Amendment" against a government intrusion only if he has "a legitimate expectation of privacy" that is violated by the intrusion. *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978); see, *e.g.*, *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968); *Katz* v. *United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The DEA agents' field test can be said to have invaded respondents' privacy in only one respect: it determined whether the suspicious substance lawfully seen by the agents was cocaine. The field test could not have discovered any other information about respondents; had the test of the powder proved negative for cocaine, it would have revealed no other fact.[5] The field test thus would not have revealed any information whatever about an innocent person.

Respondents undoubtedly would have preferred that the authorities not learn that the substance discovered by the Federal Express employees was cocaine. But that desire "is not 'one that society is prepared to recognize as "reasonable" ' " or legitimate. *Rakas* v. *Illinois*, *supra*, 439 U.S. at 144 n.12, quoting *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., con-

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[5] At trial, the agent who conducted the field test described it as "a Scott reagent field test * * * for cocaine" (Tr. 158) and briefly explained its operation. The DEA informs us that this test will reveal only whether or not a substance is cocaine; if it is not cocaine, the test will not reveal its composition. This fact was not brought out at the suppression hearing or the trial, because neither focused on the precise nature of the test, but the court of appeals' opinion did not presuppose that the test revealed more than whether or not a substance is cocaine.

It is, in any event, most unlikely that any lawful substance, the chemical composition of which the owner might legitimately wish to conceal from the authorities, would be shipped in the way respondents' cocaine was shipped.

curring). In no sense were respondents entitled to keep that information from the authorities once the transparent package had come into the latter's lawful possession. Cf. *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980); *Branzburg* v. *Hayes*, 408 U.S. 665, 695-697 (1972). Since the field test was incapable of disclosing anything except information that respondents could not legitimately be entitled to keep private, they cannot claim that the test violated their Fourth Amendment rights.

Principally for these reasons, *Walter* does not at all support the conclusion that the agents were required to obtain a warrant before conducting the field test. Viewing a film discloses far more information that a person has a legitimate interest in keeping private—even if, as in *Walter*, the contents are described on the container—than conducting a field test to determine whether a pill or powder is an illegal or controlled substance. The viewing of a film, of course, implicates First Amendment values, which played a role in *Walter*. See 447 U.S. at 655 & n.6 (opinion of Stevens, J.); *Roaden* v. *Kentucky*, 413 U.S. 496, 502 (1973), quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 472 (1971) ("The seizure of instruments of a crime, * * * or 'contraband * * *' [is] to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards."). See also *United States* v. *Barry*, *supra*, 673 F.2d at 920. Viewing a film also reveals much about the ideas and attitudes of the person who made it, and about the interests and tastes of the recipient. See *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952). The field test at issue here was incapable of disclosing even remotely comparable information or of invading respondents' privacy to a comparable degree, and the court of appeals' mechanical equation of the

viewing of a film with a field test reflects a failure to consider carefully the varying privacy interests at stake.[6]

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[6] At some points in its opinion, the court of appeals suggested that the DEA agents violated the Fourth Amendment in other respects in addition to conducting the field test. See, *e.g.*, App. A, *infra*, 8a ("We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of [respondents'] fourth amendment rights."). But it seems unlikely that the court of appeals considered the agents' actions, other than the field test, to be a violation of the Fourth Amendment, and to the extent it did the court was incorrect.

The Federal Express employees opened the cardboard package and removed the plastic bags from the tube. It is undisputed that federal agents were not implicated in this search. The court of appeals appears to have accepted the principle—seemingly endorsed by a majority of this Court—that to the extent the agents merely repeated the steps taken by the private persons, their actions did not implicate Fourth Amendment interests. See App. A, *infra*, 4a, 5a-6a; *Walter* v. *United States*, *supra*, 447 U.S. at 656, 659 & n.14 (opinion of Stevens, J.); *id.* at 663 (Blackmun, J., dissenting). In any event, when the Federal Express employees gave the package to the DEA agents, the plastic bags were visible from outside the tube (App. A, *infra*, 1a); it is therefore clear that the agents' observation of the transparent plastic bags with a white powder did not invade any Fourth Amendment interest. See *Walter* v. *United States*, *supra*, 447 U.S. at 661 (opinion of White, J.), quoting *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 489.

Having lawfully seen the bags, the agents could not have violated the Fourth Amendment when they opened them and extracted a sample. A transparent bag is surely the best example of a "container[] * * * [that] by [its] very nature cannot support any reasonable expectation of privacy because [its] contents can be inferred from [its] outward appearance" (*Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979); see *Robbins* v. *California*, 453 U.S. 420, 427 (1981) (plurality opinion); *Blair* v. *United States*, 665 F.2d 500, 506-507 (4th Cir. 1981)). The court of appeals therefore should have concluded, and apparently did

2. The court of appeals acknowledged that its decision conflicts with *United States* v. *Barry*, *supra*,[7] and no other court of appeals that has considered a case in which a field test was conducted has even suggested that such action might require a warrant. Several of these cases involved circumstances closely parallel to those present here, in which a private carrier delivered containers holding a suspicious substance to the authorities. See, *e.g.*, *United States* v. *Jennings*, 653 F.2d 107, 108 (4th Cir. 1981); *United States* v. *Andrews*, 618 F.2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979);

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conclude, that the agents lawfully came into possession of the substance they tested.

The court of appeals did not appear to suggest that the agents' actions constituted an improper seizure, either because they retained the package for a time or because they destroyed a minute portion of the cocaine when they tested it. In any event, there is no reason to believe that the brief retention of the package interfered with any possessory interest of respondents'. See *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). The destruction or retention of cocaine implicates no protected interest, since respondents' cocaine was contraband that the government is "entitled to * * * possess[]" (*Boyd* v. *United States*, 116 U.S. 616, 623-624 (1886)). Even the destruction or retention of a small amount of an innocent material might well be de minimis; if it were not, it would amount to an invasion of only a (possibly compensable) property interest, not a privacy interest. Moreover, the Fourth Amendment permits seizures upon probable cause even without a warrant (*Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977)), and in our view the agents had probable cause to believe that the package contained a controlled substance even before the field test. See page 12 note 9, *infra*.

[7] When we opposed certiorari in *Barry*, we acknowledged the conflict but said that review by this Court was not warranted because the decision in *Barry* was plainly correct and the court of appeals had not yet acted on our petition for rehearing in the present case. See 81-6942 Br. in Opp. 6.

United States v. *Rodriguez*, 596 F.2d 169, 173-175 (6th Cir. 1979); *United States* v. *Crabtree*, 545 F.2d 884 (4th Cir. 1976); *United States* v. *Ford*, 525 F.2d 1308, 1312 (10th Cir. 1975).

3. Field tests are of great importance to the enforcement of the narcotics laws. These tests are conducted very frequently, generally by agents who want to determine quickly and on the scene whether to pursue the investigation of a suspicious substance—whether, for example, to make a controlled delivery, as in this case, or to arrest a person found in possession of the substance.

By requiring these agents to obtain warrants, the court of appeals' approach will, to a large degree, defeat the purpose of the field test. It will become impossible for agents to determine quickly and with certainty whether a suspicious substance is an illegal drug; they will have to operate under conditions of uncertainty for a considerable period while a warrant is obtained. Some investigations will, in all probability, be impeded by the delay, and the delay may also prejudice innocent private parties—if, for example, an agent detains a package (or a person found with a suspicious substance) until he obtains the warrant he needs to conduct the test.[8] See, *e.g.*, *United States* v. *Jennings*, *supra*, 653 F.2d at 111 (airline employee asked DEA to conduct a field test because if substance in package was not determined to be contraband, airline was obligated to send it to addressee on next flight).

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[8] Of course, if an agent has probable cause, he can, under the court of appeals' ruling, conduct a field test in exigent circumstances. But delay can prejudice an investigation even in circumstances insufficiently exigent to justify a search without a warrant; it is often appropriate to pursue an investigation even in the absence of probable cause; and some agents will, if the court of appeals' ruling stands, feel compelled to obtain a warrant before conducting a field test out of an abundance of caution even if exigent circumstances exist.

Moreover, an agent will often have probable cause to believe that a suspected substance is contraband even without conducting a field test.[9] Instead of waiting for a warrant to be obtained, he may decide simply to proceed with his investigation, which may lead to such relatively more intrusive actions as surveillance, a controlled delivery, a search under exigent circumstances, or an arrest. Under the court of appeals' rule, these costs will be incurred *solely* to protect the interest a possessor of contraband has in concealing the *nature* of the substance from the authorities—an interest that should receive no protection whatever.

Finally, the logic of the court of appeals' ruling applies not just to field tests but to laboratory analyses of lawfully seized samples of suspicious substances. The results of laboratory analyses are routinely introduced into evidence in drug prosecutions. If the court of appeals' approach were to prevail, law enforcement authorities would be forced in most instances to obtain a warrant before conducting a laboratory test, and as a result literally thousands of additional warrants would be sought annually. This massive burden—to protect

[9] We believe that the agents here had ample probable cause to believe that the plastic bags contained cocaine even before they conducted the field test. The court of appeals' contrary ruling (App. A, *infra*, 8a), is surely implausible; it is most unlikely that any legal white powdered substance would be shipped in the way respondents' cocaine was packaged. Moreover, a holding that there was no probable cause to believe that the powder was cocaine appears to lead to the conclusion that the agents were helpless to do anything to interdict the shipment of cocaine or to apprehend respondents, since presumably without probable cause they could not even obtain the warrant that the court held was needed for the field test. See page 11 note 8, *supra*.

Because the agents had probable cause independent of the field test, the evidence they obtained in the search of respondents' house (pursuant to the warrant) was not "tainted" by the field test, and the court of appeals erred in ordering its suppression.

an interest that, so far as we are aware, no other court has ever thought to require the protection of the Warrant Clause—is plainly unjustified.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

JANUARY 1983

APPENDIX A

UNITED STATES OF AMERICA, APPELLEE,

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, APPELLANTS.

No. 81-2158.

United States Court of Appeals,
Eighth Circuit.

Submitted May 20, 1982.
Decided July 27, 1982.

Before LAY, Chief Judge, HEANEY, Circuit Judge, and BECKER* Senior District Judge.

LAY, Chief Judge.

The fundamental issue in this appeal is whether federal drug agents' warrantless search of a package damaged in transit and inspected by employees of a private carrier was a violation of the warrant clause of the fourth amendment. We find the search unconstitutional.

The facts may be briefly stated. A supervisor for Federal Express, a private freight carrier, discovered a damaged package. Pursuant to company policy, a manager examined the contents of the package. The package consisted of a cardboard box wrapped in brown paper. Inside the box was a tube of duct tape. Inside the tube were four clear plastic bags, one inside the next, the innermost containing white powder. Federal Express employees, thinking the powder might be a controlled substance, notified the Drug Enforcement Agency. The manager then placed the bags back in the tube, leaving them visible from the tube's end, and placed the tube back in the box.

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* William H. Becker, Senior District Judge, Western District of Missouri, sitting by designation.

When DEA Agent Jerry Kramer arrived, the manager gave him the box. Kramer removed the tube from the open box, took the bags out of the tube, and extracted a sample of the powder. He thereafter conducted a field test on the powder which indicated the powder was cocaine. A short time later another sample was removed for further testing. The package was then rewrapped and Federal Express was directed to deliver the package to the addressee shown on the label. The package was addressed to Mr. D. Jacobs, 7300 West 130th Street, Apple Valley, Minnesota.

Drug enforcement agents determined Bradley Jacobsen lived at this address. He was mentioned in at least two previous DEA investigative files relating to cocaine distribution. On the basis of this information and the field testing, the drug enforcement agents obtained a warrant from a magistrate to search the defendant's home.

During the afternoon of May 1, 1981, DEA Agent James Lewis went to the Jacobsen home with the package. Dressed in ordinary street clothes, Lewis delivered the package to Donna Jacobsen, Bradley's wife. Lewis returned to the home approximately one hour later with eight to ten other officers. When Lewis identified himself, Bradley Jacobsen slammed the door, knocking Lewis down, and yelled, "It's the police—flush it." The officers forced the door open and searched the house. Cocaine traces, cocaine paraphernalia, and burned remnants of the package were found. The Jacobsens were arrested.

Defendants moved to suppress the evidence seized in their home as fruit of an illegal search of the package. Magistrate Floyd E. Boline recommended the motion be denied because the government's search did not exceed the scope of the private search. Over defendants' objection, the district court, Judge Harry H.

MacLaughlin presiding, refused to suppress the evidence.

Bradley and Donna Jacobsen were tried before a jury and convicted on one count of possession with intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and one count of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. Bradley Jacobsen was also convicted of assault on a federal officer in violation of 18 U.S.C. § 111. This appeal followed entry of judgment.

We find that the evidence should have been suppressed and thus reverse the defendants' convictions for possession with intent to distribute cocaine and for conspiracy. We find the evidence sufficient to sustain a finding that Bradley Jacobsen assaulted a federal officer and thus sustain his conviction on that count.[1]

Since *Ex parte Jackson*, 96 U.S. 727, 24 L.Ed. 877 (1877), it has been the law that letters and sealed packages are protected from government inspection. The Jacobsens had a reasonable expectation that the contents of the package would remain private. *See Walter v. United States*, 447 U.S. 649, 651-52, 654, 100 S.Ct. 2395, 2398-99, 65 L.Ed.2d 410 (1980) (material carried by private carrier); *United States v. Van Leeuwen*, 397 U.S. 249, 251-52, 90 S.Ct. 1029, 1031-32, 25 L.Ed.2d

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[1] Bradley Jacobsen was sentenced to the custody of the Attorney General for 12 months on count I, plus a three-year special parole term; six months on count II, consecutive to the sentence on count I; and 12 months on count III, concurrent with the sentences for counts I and II. Donna Jacobsen was sentenced to the custody of the Attorney General for 12 months on count I, plus a special parole term of three years. She was also sentenced to a term of 12 months on count III, concurrent with the sentence on count I. Both of these sentences were suspended and she was placed on three years probation on condition that she serve a period of three months in a jail-type facility.

282 (1970). *Contra United States v. Barry*, 673 F.2d 912 (6th Cir. 1982) (Edwards, C. J., dissenting).[2]

The government argues that the fourth amendment does not forbid evidentiary use of the fruits of a private search conducted without government participation or encouragement. *Coolidge v. New Hampshire*, 403 U.S. 443, 487-90, 91 S.Ct. 2022, 2048-50, 29 L.Ed.2d 564 (1971); *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921). Defendants do not argue that the Federal Express employees opened the package pursuant to any form of government directive. They assert, however, that the federal agents' search exceeded the scope of the private search.

In *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 210 (1980), a private carrier delivered a number of sealed packages to the wrong company. Employees of the company opened the packages and found boxes of film. The boxes contained suggestive drawings and explicit descriptions of the films' contents. An employee of the private carrier removed a reel of film and attempted to view it by holding it against a light, but he could not see its contents and no

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[2] The government does not contest the standing of either Bradley or Donna Jacobsen to challenge the search of the package. The sender and intended recipient of a package clearly have "an adequate possessory or proprietary interest in the ... object searched" to give them standing to question the propriety of its search or seizure. *See United States v. Haes*, 551 F.2d 767, 769-70 (8th Cir. 1977) (quoting *United States v. Kelly*, 529 F.2d 1365, 1369 (8th Cir. 1976)).

The package was addressed to Mr. D. Jacobs (the magistrate's report omits the "Mr." but the search warrant affidavit includes it). Mr. Jacobsen's first name is Bradley and Mrs. Jacobsen's first name is Donna. Given this ambiguity as to who the package was addressed to and the fact that it was sent to the address at which the Jacobsens were living as husband and wife, we conclude that both Jacobsens have standing to challenge the search.

attempt was made to project the film. The employees contacted the FBI. Without obtaining a warrant, FBI agents took possession of the packages and screened the films.

The Court, in a five to four decision,[3] found the agents' actions violated the fourth amendment. The plurality held that the agents were lawfully in possession of the films, but should have obtained a warrant authorizing them to view the films. The screening of the films was an investigation which yielded incriminating evidence not disclosed on the films' containers. The viewing was deemed a search. *Id.* at 653-54, 100 S.Ct. at 2399-2400.

In *Walter*, the private search exposed the boxes to government scrutiny. The plurality held, however, that government scrutiny must be strictly confined to what is exposed by the private search. *Id.* at 656-57, 100 S.Ct. at 2401-02 (comparing limitation to that imposed by terms of warrant). Justice Stevens concluded:

> Prior to the Government screening, one could only draw inferences about what was on the films. The projection of the films was a significant expansion of the search that had been conducted previously by a private party and therefore must be characterized as a separate search. That separate search was not supported by any exigency, or by a warrant even though one could have easily been obtained.

Id. at 657, 100 S.Ct. at 2402 (footnotes omitted). *See also United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977).

In this case, the Federal Express employees removed the plastic bags from the tube, but did not re-

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[3] Justice Stevens wrote the opinion for the Court, joined by Justice Stewart. Justice White wrote a concurring opinion which Justice Brennan endorsed. Justice Marshall concurred in the judgment.

move or in any way analyze any of the powder; they subsequently replaced the bags back in the tube. The DEA agents removed the bags, took several samples of the powder, and subjected the samples to tests in order to determine their composition.

The private search in this case exposed bags of powder, but the Jacobsens' initial reasonable expectation that the package's contents would remain private was not entirely frustrated by the private search. In *Walter*, Justice Stevens wrote:

> The fact that the cartons were unexpectedly opened by a third party before the shipment was delivered to its intended consignee does not alter the consignor's legitimate expectation of privacy. The private search merely frustrated that expectation in part. It did not simply strip the remaining unfrustrated portion of that expectation of all Fourth Amendment protection.

Id. at 658-59, 100 S.Ct. at 2402-03 (footnotes omitted).

The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder. In the absence of exigent circumstances, which the government does not allege, we hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof.[4]

---

[4] In almost identical circumstances, a panel of the Sixth Circuit, in *United States v. Barry*, 673 F.2d 912 at 920 (6th Cir. 1982) held that a warrant is not required to conduct chemical analysis of a sample of a seized substance. *See also People v.*

In this case, the government does not assert and we do not perceive any circumstances justifying the agents' failure to obtain a warrant authorizing examination of the contents of the package. *Cf. United States v. Ross*, ___ U.S. ___, 102 S.Ct. 2157, 72 L.Ed.2d ___ (1982) (automobile exception). As the Supreme Court stated in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d (1971):

> The warrant requirement has been a valued part of our constitutional law for decades, and it has determined the result in scores and scores of cases in courts all over this country. It is not an inconvenience to be somehow "weighed" against the claims of police efficiency. If is, or should be, an important working part of our machinery of government, operating as a matter of course to check the "well-intentioned but mistakenly overzealous executive officers" who are a part of any system of law enforcement.

Adler, 50 N.Y.2d 730, 431 N.Y. S.2d 419, 409 N.E.2d 888, *cert. denied*, 449 U.S. 1014, 101 S.Ct. 573, 66 L.Ed.2d 473 (1980); *cf. United States v. Andrews*, 618 F.2d 646 (10th Cir.), *cert. denied*, 449 U.S. 824, 101 S.Ct. 84, 66 L.Ed.2d (1980) (upholding without discussion search involving sampling and testing following more limited private search). The court in *Barry* attempts to distinguish *Walter* on the grounds that the films were protected by the first amendment and that the chemical test was not as significant an investigation as the viewing of a film. *Id.* 673 F.2d at 920. We disagree with this analysis. *Walter* rested on the fourth amendment, not the first amendment. The invasion of privacy and collection of inculpatory evidence involved in testing unidentified substances is parallel to the investigation and intrusion involved in screening a film. In *Adler*, the New York Court of Appeals dismissed the chemical analysis on the grounds that the content of the substance was already evident and the substance was legally in the possession of the police. This reasoning allows a finding of probable cause to eliminate the warrant requirement of the fourth amendment contrary to established principles of fourth amendment jurisprudence.

Id. at 481, 91 S.Ct. at 2045 (footnote omitted). *See also Mincey v. Arizona*, 437 U.S. 385, 390, 98 S.Ct. 2408, 2412, 57 L.Ed.2d 290 (1978). We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of defendants' fourth amendment rights.

The fruits of this illegal search should have been suppressed. The finding of cocaine in a package being sent to the Jacobsens' home was the core of the affidavit which justified the issuance of the warrant to search the Jacobsens' home. The only other allegation contained in the affidavit is that Bradley Jacobsen is "mentioned in at least two investigative files for cocaine distribution." Without the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe the Jacobsens possessed cocaine in their home. The search produced traces of cocaine, drug paraphernalia, and remnants of burned tape which matched that used to wrap the package. This evidence was improperly admitted. On this basis, we reverse the defendants' convictions on the drug related counts.

Bradley Jacobsen also appeals from his conviction for assaulting a federal officer, arguing the evidence was insufficient to support the verdict. He alleges he did not have the requisite specific intent to assault the officer. Viewing the evidence in the light most supportive of the verdict, we find reasonable minds could have concluded without a reasonable doubt that Bradley Jacobsen intended to assault the federal officer. *Cf. United States v. Manelli*, 667 F.2d 695 (8th Cir. 1981).

We reverse both defendants' convictions for possession with intent to distribute cocaine and conspiracy to distribute cocaine. We affirm Bradley Jacobsen's conviction for assault on a federal officer.

WILLIAM H. BECKER, Senior District Judge, concurring specially.

I concur in the opinion in this case, with serious reservations for the reasons stated in the dissenting opinion by Justice Blackmun of the Supreme Court of the United States in *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980), because I believe it is more than possible that the rule enunciated in that opinion will become the majority rule in the future. The federal law in the field of unreasonable and therefore unconstitutional searches and seizures is being reexamined by the Supreme Court of the United States in a movement toward reexamination and restriction of the outer limits of the exclusionary rule. See *United States v. Ross*, ___ U.S. ___, 102, S.Ct. 2157, 72 L.Ed.2d ___ (1982). Even the author of the plurality opinion in *Walter v. United States*, *supra*, acknowledged in Part V of *United States v. Ross*, *supra*, that: "Nevertheless, the doctrine of *stare decisis* ..." does not preclude a change in the law governing warrantless searches. Because the result of the majority opinion follows an interpretation of the current law in this field of constitutional law in this Court and of the current opinions of the Supreme Court of the United States, I concur with the reservations expressed above.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term

No. 81-2158

UNITED STATES OF AMERICA, APPELLEE,

v.

BRADLEY THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, APPELLANTS.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA

The Court, having considered appellee's petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judges Ross, Arnold and John R. Gibson would grant petition for rehearing en banc.

October 14, 1982

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 81-2158

Filed July 27, 1982

UNITED STATES OF AMERICA, APPELLEE,

v.

BRADLEY THOMAS JACOBSEN, APPELLANT.

JUDGMENT

This appeal from the United States District Court for the District of Minnesota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the conviction for possession with intent to distribute cocaine and conspiracy to distribute cocaine be, and it is hereby, reversed in accordance with the opinion of this Court.

It is further ordered that the conviction for assault on a federal officer be, and it is hereby, affirmed in accordance with the opinion of this court.

July 27, 1982

A True Copy:

ATTEST: /s/ ROBERT D. ST. VRAIN

Clerk, U.S. Court of Appeals,
Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

CRIM. 4-81-53

RECEIVED JUL 23, 1981

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BRAD THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, DEFENDANTS

ORDER

John M. Lee, Acting United States Attorney, and Janice M. Symchych, Assistant United States Attorney, 234 U.S. Courthouse, Minneapolis, MN 55401, for plaintiff.

Mark W. Peterson, Friedberg & Peterson, Suite 100 Marquette Building, 400 Marquette Avenue, Minneapolis, MN 55401, for defendant Donna Marie Jacobsen.

Earl P. Gray, 1805 American National Bank Building, St. Paul, MN 55101, for defendant Brad Thomas Jacobsen.

This matter is before the Court on the objections of the defendants to the report and recommendation of the United States Magistrate dated June 24, 1981. Based on this Court's independent de novo determination of the Magistrate's report, findings and recommendations, the objections will be overruled.

The facts are fully set forth in the Magistrate's report and need not be repeated here. The Court finds it unnecessary to undertake a thorough analysis of the defendant's objection to the Magistrate's finding that the gray tube was in plain view in the box because the Court believes that this fact is immaterial to the legal

issue presented here. Therefore the Court will assume, without deciding, that the newspaper in the box covered the gray tube and that neither the gray tube nor the contraband could be seen when the box was turned over to the Drug Enforcement Agency (DEA) agents.

The issue raised by the defendants here is whether the DEA agents needed a search warrant to look into the box and perform a field test of the powder when they arrived at the Federal Express office. The defendants concede that the initial search of the package and discovery of the cocaine by the Federal Express employees was not proscribed by the fourth amendment because it was done by private persons and not by the federal officers. The defendants also concede that the cocaine was seized by the Federal Express employees when Mr. Stegemoller put the box containing the cocaine into a locker in his office. The defendants concede that the DEA agents lawfully obtained custody of the box containing the cocaine because the seizure was done by private persons. However, the defendants assert that after the agents obtained custody of the box, they were required to obtain a search warrant before examining the contents.

The defendants rely upon *United States v. Roberts*, 644 F.2d 683 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 79 (1980) (en banc) and *Walter v. United States*, 447 U.S. 649 (1980). Neither case supports the defendants position. In *Roberts*, the defendant had leased two storage units from the same company at two separate locations, one in Independence, Missouri, and the other in Gladstone, Missouri. On one evening, employees at both locations notified the general manager of the storage company that they had discovered several unlocked units at each location. The general manager went to the Gladstone location to investigate. One of the unlocked units belonged to the defendant. When the general manager entered this unit to investigate, he discovered

a large bag of marijuana. When he left this storage facility, he secured the door by bolting an exterior door. This was a routine procedure designed to protect the property rather than to prevent the lessee from gaining access to the storage locker. The general manager then went to the Independence location. He again looked through the unlocked storage units. In the unit belonging to the defendant, he observed several boxes of what appeared to be marijuana. This time, the general manager had guards posted over the premises and notified the police. Within a short time, the police arrived at the Independence location and took possession of the material. The next day the police went to the Gladstone location and seized the large bag of marijuana.

The *Roberts* court held that the drugs stored at the Independence facility had been seized by private persons before the arrival of the officers, and that therefore the district court erred in suppressing the evidence based on that seizure. However, the court ruled that the large bag of marijuana at the Gladstone facility had not been seized by private persons, and therefore the warrantless seizure by the police was improper. The defendants here argue that the *Roberts* holding that a warrant was required before the police could seize the large bag of marijuana indicates that a search warrant was required of the DEA agents here before examining the seized box. However, the facts of this case are nearly identical to the occurrences at the Independence location in *Roberts*. The defendants overlook the fact that no search warrant was required of the police officers when they took possession of the seized boxes at the Independence location. Although the Eighth Circuit did not discuss the issue, it apparently agreed with the two other circuits that have held that when a private person makes an initial search of a closed container and then turns the container over to government authorities, the reopening of the container does not constitute

a separate search requiring a warrant. *See United States v. Bulgier*, 618 F.2d 472 (7th Cir.), *cert. denied*, 101 S.Ct. 125 (1980); *United States v. Blanton*, 479 F.2d 327 (5th Cir. 1973).

In addition, the Supreme Court has agreed that no warrant is required in such situations. In *Walter v. United States*, 447 U.S. 649 (1980), the case upon which the defendants seek to rely, Justice Stevens, in the plurality opinion, stated: "In these cases there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties." *Id.* at 656. In this case, the Federal Express employees had already opened the box and removed the bags containing the white powder from the gray tube. The only investigation of the contents of the box beyond the investigation by Federal Express employees was the field test by the DEA agents. Thus, the defendants' contention is that when federal agents lawfully receive possession of a substance they believe to be contraband, they must obtain a search warrant before a field test to verify the chemical content of the contraband may be performed. This contention is without foundation. *Cf., United States v. Andrews*, 618 F.2d 646 (10th Cir.), *cert. denied*, 101 S.Ct. 84 (1980), (held that white powder, which was discovered by private person and then field tested by office without a warrant, was admissible).

Accordingly, IT IS ORDERED that the defendants' objections to the report and recommendation are overruled, the report and recommendation as supplemented herein is adopted, and the defendants' Motion to Suppress is denied.

/s/ HARRY H. MACLAUGHLIN

JUDGE HARRY H. MACLAUGHLIN
United States District Court

DATED: July 22, 1981

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Criminal No. 4-81-53

Filed January 4, 1982

UNITED STATES OF AMERICA, PLAINTIFF,

v.

BRAD THOMAS JACOBSEN AND
DONNA MARIE JACOBSEN, DEFENDANTS.

REPORT AND RECOMMENDATION

A hearing was held in the above-entitled action before the undersigned United States Magistrate on May 21, 1981 on the defendants' Motion to Suppress. Defendant Brad Jacobsen was present in court with his counsel, Earl Gray, Esquire. Defendant Donna Jacobsen was present in court with her counsel, Mark Peterson, Esquire. The government was represented by United States Attorney John M. Lee.

Defendants are charged in a three count indictment. Count I charges them jointly with the unlawful possession of cocaine with intent to distribute in violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2. Count II charges only defendant Brad Thomas Jacobsen with willfully assaulting, resisting and interfering with a special agent of the Drug Enforcement Administration while he was engaged in the performance of his official duties in violation of Title 18, United States Code, Sections 111 and 1114. Count III charges the defendants jointly with conspiring to violate Title 21, United States Code, Section 841, that being to distribute cocaine in violation of Title 21, United States Code, Section 846.

FINDINGS OF FACT

Daniel Stegemoller, the City Manager of the Federal Express Office at the Minneapolis-St. Paul International Airport, arrived in his office for work between 7:00 and 7:30 a.m. on May 1, 1981. Between 7:30 and 8:30 a.m. Ed Childers, a supervisor for Federal Express, called Mr. Stegemoller into his office and showed him a wrapped package on his desk which had been damaged and torn by a fork on a forklift. Stegemoller instructed Childers to open the package in order to examine its contents for possible damage. This was done pursuant to company policy set forth in a policy and procedures manual, page 14 of which was received in evidence as Defendant's Exhibit #3. The procedures manual states in part:

> "**OPENING A PACKAGE**—We can open a package for inspection if:
>
> A. There is visible damage or suspected damages.
>
> B. There are no markings or insufficient markings to identify the package.
>
> C. Any time the station manager has reasonable cause to believe the shipment may be dangerous or of such a nature that carriage aboard an FEC aircraft would violate a statute or federal regulation."

Damaged packages are opened and inspected because of the possibility of insurance claims.

The package consisted of a cardboard box wrapped in brown paper. Inside the box was newspaper and a tube wrapped with gray tape; the tube was about 10 inches long. Inside the tube was a series of four plastic bags, one inside the other; the innermost bag contained a white powder. Because Stegemoller thought the white powder might be an illegal substance, he called the Federal Express Central Regional Security Manager, Edgar J. Davis, in Chicago; the call was made pursuant

to company procedure. After Stegemoller reported that he had found a suspicious white powder during a routine examination of a damaged package, Mr. Davis instructed Stegemoller to notify the Drug Enforcement Administration. If suspected illegal drugs are discovered at an airport it is the policy of Federal Express to notify the DEA because Federal Express has no authority to confiscate illegal drugs.

At about 9:00 a.m. Ed Childers called Special Agent James Lewis of the DEA and reported the incident to him. Agent Lewis called Agent Jerry Kramer and asked him to pick up Agent Jacobson and meet him at the airport.

Mr. Stegemoller put the plastic bags containing the white powder back in the tube, laid the tube in the top of the box and then carried the box to his office and put it in a locker. The tube was in plain view in the box and the bags with the white powder were visible from the end of the tube.

Agent Kramer arrived at the Federal Express office first. Mr. Stegemoller gave him the opened box and it was put on a desk. Agent Kramer pulled the bags containing the white powder from the tube; he field tested the white powder and it tested positive for cocaine. When Agent Lewis arrived he removed another small sample of the white powder from the bag for further testing. The agents gave Mr. Stegemoller a receipt for the package and then took it to the airport DEA office.

The package, which was addressed to D. Jacobs, 7300 West 130th St., Apple Valley, MN was rewrapped by the agents with new brown paper; this was necessary because the original wrap was too extensively damaged to be used again. The purpose of re-wrapping the package was so that the agents could make a controlled delivery of the package to the defendants.

Based upon the above information, which was set forth in an affidavit of Special Agent David Haight, a

search warrant was obtained for the single family dwelling of the defendants, which is the same address as that of the consignee on the package. The search warrant was received in evidence as Government Exhibit #1.

At approximately 2:45 p.m. on May 1, 1981, Agent Lewis went to defendants' residence with the package. When defendant Donna Jacobsen answered the door, Agent Lewis told her he had a package to deliver. Mrs. Jacobsen signed for the package and Agent Lewis left it with her. Agent Lewis drove to the house in an unmarked van owned by the State of Minnesota; he was dressed in blue pants, shirt and jacket.

Agent Lewis returned to the residence of the defendants approximately one hour later with eight to ten other law enforcement officers, some of them in uniform. Four officers took positions around the house and Agent Lewis went to the front door with about four or five officers behind him. Agent Lewis knocked on the door a few times and defendant Brad Jacobsen opened the door (there was no screen door). Agent Lewis stated that when he had delivered the package earlier, Mrs. Jacobsen had signed the wrong weigh bill; he then extended his hands with a weigh bill in his left hand covering his credential holder and badge which were in his right hand. Agent Lewis next removed the weigh bill from over his credentials and badge and said "police". Defendant Brad Jacobsen slammed the door into Agent Lewis's face, breaking his glasses and knocking him off the front door stoop.

Agent Lewis heard defendant Brad Jacobsen yell "It's the police—flush it" and then heard footsteps running up the stairs; he and the other officers yelled "police—open up" twice. When there was no response, and after about five to ten seconds, the officers kicked the door open and entered the house. As the officers

entered the house and as they searched each room they yelled "police".

The agents executed the search warrant and seized a number of items, including suspected illegal substances. The defendants were arrested.

There is no evidence of any working relationship between Federal Express and the government. The cocaine in the package was discovered through the exercise of routine company procedures by Mr. Stegemoller and Mr. Childers.

MEMORANDUM

There were no statements or confessions made by either defendant to law enforcement officers. Agent Lewis testified at the hearing that after defendant Brad Jacobsen slammed the door shut he heard him yell "It's the police—flush it", but an unsolicited exclamation such as that is not of the kind contemplated by *Miranda* v. *Arizona*, 348 U.S. 436 (1966).

The search and seizure conducted at the defendants' residence on May 1, 1981 was conducted pursuant to a search warrant signed by United States Magistrate J. Earl Cudd. The search warrant was for "a split entry, single family dwelling, brown in color with an attached garage bearing the address of 7300 on the residence. Also bearing the number of 7300 on the mailbox at the address of 7300 West 130th Street, Apple, Valley, MN." The search warrant described the property which was suspected as being concealed at that address as "four ounces of cocaine together with the package used to transport it, as well as other drugs, drug sales profits, and investment and any other records pertaining to previous drug shipments and co-conspirators."

The property which was seized in the course of executing the search warrant, and which is described in the return thereto, is as follows:

1. Traces of white powder found by J. Lewis in master bedroom.

2. One cardboard box found by D. Haight on bed in master bedroom.

3. Fifty-nine white capsules found by R. Romcik in drawer—hall bathroom.

4. One wood box cont. three plastic bags of p.m. and also paraphenalia found by D. Haight in basement safe.

5. Four yellow tablets in plastic bags cont. in false bottom can found by T. Olby in bath, master bedroom.

6. One Eastern A.L. receipt found by D. Haight in basement.

7. Misc. papers.

8. One pink capsule; one blue tablet; white powder traces in container found by J. Lewis in hall bath.

9. Two address books found by J. Lewis—kitchen.

10. Charred tape found by J. Lewis in basement fireplace.

11. Misc. papers—found by J. Lewis in office.

12. Water from MBR restroom—Olby—has white powder in it.

I have already found that the examination of the damaged package and its contents by employees of Federal Express was done in their private capacity, without any prior knowledge or instigation by the government.

The defendants rely heavily on *United States* v. *Roberts*, 644 F.2d 683 (8th Cir. 1980) where the trial court had suppressed two separate seizures of marijuana from two separate "Stor-All" rental units. The Court of Appeals reversed the suppression on one of the seizures which was nearly on all fours with the seizure in the instant case. In *Roberts*, employees of Stor-All had looked into two unlocked rental units, at two different

locations, and discovered what they thought was marijuana.

The Court in *Roberts*, at p. 686, framed the issue to be resolved in a case such as this as follows:

> "Where a search and an ultimate seizure are initiated and largely carried out by private persons, but where law enforcement officers get involved in the overall process and ultimately take over the material seized, this court has held that a court in determining whether there has been a violation of the fourth amendment must consider: (1) official involvement in the initial search, and (2) official involvement in the effective seizure of the item or items in question. *United States* v. *Haes*, 551 F.2d 767, 770 (8th Cir. 1977); *cf. United States* v. *Entringer*, 532 F.2d 634 (8th Cir.), *cert. denied*, 429 U.S. 820, 97 S.Ct. 67, 50 L.Ed.2d 81 (1976)."

In reversing the suppression of the evidence seized from one of the Stor-All units the Court held at p. 688:

> "A different situation is presented as to Count I. When Stor-All agents found some 900 pounds of a substance that appeared to be marijuana stored in the Independence facility, they immediately mounted guard over the premises and notified the police. Officers appeared on the scene promptly and took possession of the material in question which turned out to be marijuana. The work of the officers with respect to the seizure at Independence was not completed until the small hours of November 30, 1978 which may tend to explain why the Gladstone facility was not immediately visited by the officers.
>
> Had a claimant of the material stored at Independence undertaken to take possession of the material between the time it was discovered by private persons and the time of the arrival of the officers, it is unreasonable to think that he would have been allowed to pick up, destroy, or take away the contraband.

> We conclude, therefore, that the drug stored at Independence had been seized privately before the arrival of the officers, and that the district court erred in suppressing evidence based on that seizure.
>
> Accordingly, we reverse the district court as to Count I while affirming as to Count II. The case is remanded for further appropriate proceedings."

In the instant case Mr. Stegemoller of Federal Express clearly seized the evidence here when he stuffed the plastic bags of cocaine back into the tube, laid the tube in the box, and put the box into a locker in his office. As stated in the above quote, it is unreasonable to believe that at this point the defendants would have been allowed to pick up, destroy, or take away the contraband.

In *United States* v. *Wedelstedt*, 589 F.2d 339 (8th Cir. 1978), cited in defendant's memorandum, the Court found no government involvement in a seizure made by a private employee, stating at p. 346:

> "... However, there is no evidence that any federal or state agent 'directed, authorized or knew' of the seizure by Meade. *United States* v. *Luciow*, 518 F.2d 298, 300 (8th Cir. 1975). In *Luciow*, the informer made an allegedly illegal entry and search. The defendant sought to suppress the evidence obtained, but the court found no violation of the fourth amendment: 'Before * * * action can be attributed to the government, some degree of government instigation of the illegal entry must be shown.' *Id.*
>
> Here, there was no evidence that the seizure was conducted 'with government knowledge and consent, tacit or explicit * * *.' *United States* v. *Mekjian*, 505 F.2d 1320, 1328 (5th Cir. 1975). The district court's detailed findings of nongovernmental involvement are not clearly erroneous. Absent governmental involvement, there is no error in the admission of the exhibit. *Id.* at 1327. See

also *Gunlach* v. *Janing*, 536 F.2d 754, 755 (8th Cir. 1976)."

The defendants' memorandum also cites *United States* v. *Warinner*, 607 F.2d 210 (8th Cir. 1979). The facts of that case are so dissimilar from the facts in the instant case that it is of little or no help in resolving the issue pending before the Court.

The defendants rely heavily on *Walter* v. *United States*, 447 U.S. 649 (1980), a case which is clearly distinguishable on its facts. In that case a private carrier erroneously delivered 12 large, securely sealed packages containing 871 boxes of allegedly obscene film to the wrong company. Employees of that company opened the packages and then examined the 871 boxes contained in the packages and discovered that on one side there were suggestive drawings, and on the other there were explicit descriptions of the contents. One employee opened one or two boxes and attempted without success to view one or two of the films, by holding them up to a light. Shortly thereafter they called an F.B.I. agent who picked up the packages. Subsequent to picking up the film the F.B.I. agents viewed it with a projector, some as late as two months after they had taken possession of it. It should be noted that there was no majority opinion in *Walter;* Justice Stevens wrote the opinion and was joined by Justice Stewart; Justice White filed an opinion concurring in part and was joined by Justice Brennan; Justice Marshall concurred in the judgment; and Justice Blackmun filed a dissenting opinion which was joined in by Justices Powell and Rehnquist and Chief Justice Burger. The Court stated in *Walter* at pages 656-657:

> "... It has, of course, been settled since *Burdeau* v. *McDowell*, 256 U.S. 465, that a wrongful search or seizure conducted by a private party does not violate the Fourth Amendment and that such private wrongdoing does not deprive the government of the right to use evidence that it has ac-

quired lawfully. See *Coolidge* v. *New Hampshire*, 403 U.S. 443, 487-490. In these cases there was nothing wrongful about the Government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties . . .

If a properly authorized official search is limited by the particular terms of its authorization, at least the same kind of strict limitation must be applied to any official use of a private party's invasion of another person's privacy. Even though some circumstances—for example, if the results of the private search are in plain view when materials are turned over to the Government—may justify the Government's re-examination of the materials, surely the Government may not exceed the scope of the private search unless it has the right to make an independent search. In these cases, the private party had not actually viewed the films . . ."

It should also be noted that the courts have treated the seizure of film or books differently from other seizures because of the additional protection afforded by the First Amendment; see *Walter*, *supra* at p. 655. In *United States* v. *Roberts*, *supra*, at p. 687 the Court stated:

"Citing *Roaden* v. *Kentucky*, 431 U.S. 496, 501-06, 93 S.Ct. 2796, 2799, 2802, 37 L.Ed.2d 757, this court held that where first amendment materials are involved, there must be a closer adherence to the fourth amendment than in cases involving such things as contraband or weapons. *United States* v. *Kelly*, *supra*, 529 F.2d at 1373. And the court concluded that on the record before it, there was enough government involvement to entitle the defendant to the protection of the amendment . . .

As to the distinction drawn in *Kelly* between a case involving the first amendment and a case not involving that amendment, we think that it should be said, first, that the marijuana involved here can

hardly be said to have been entitled to any first amendment protection.

Second, the police involvement in this case overall was not comparable in either quality or persistence to the official involvement present in the *Kelly* case."

United States v. *Kelly*, 529 F.2d 1365 (8th Cir. 1976), referred to in the quote above, was cited in defendants' memorandum; that case involved a seizure of books and is distinguishable from the facts in the instant case. The Court in *Kelly* said at pages 1372-1373.

"It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. (Case cited) Because of the nature of the property seized in the instant case, however, the seizure cannot be justified on the basis of the plain view exception. 'A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.' *Roaden* v. *Kentucky*, 413 U.S. 496, 501-03, 93 S.Ct. 2796, 2800, 37 L.Ed.2d 757 (1973). The Fourth Amendment should be read in conjunction with the First Amendment, rather than 'in a vacuum.' *Id.* the proper seizure of books and magazines, which are presumptively protected by the First Amendment demands a greater adherence to the Fourth Amendment warrant requirement. (Cases cited) As the Supreme Court stated in *Roaden* v. *Kentucky*, *supra:*

> The seizure of instruments of a crime, such as a pistol or a knife, or 'contraband or stolen goods or objects dangerous in themselves,' are to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards.

413 U.S. at 502, 93 S.Ct. at 2800 (citations omitted). Consequently, in the absence of exigent

circumstances in which police must act immediately to preserve evidence of the crime, we deem the warrantless seizure of materials protected by the First Amendment to be unreasonable. (Case cited)

Such a seizure without a warrant is unreasonable not because it would be easier to obtain a warrant but because prior restraint of the right to expression demands a more strict evaluation of reasonableness. *See Roaden* v. *Kentucky*, *supra*, 413 U.S. at 504, 93 S.Ct. 2796. For example, in *Marcus* v. *Search Warrant*, 367 U.S. 717, 732, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), and *Lee Art Theatre* v. *Virginia*, 392 U.S. 636, 637, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), the Supreme Court held that a warrant for the seizure of allegedly obscene material could not be issued on the mere conclusionary opinion of a police officer that the material sought to be seized was obscene. In the absence of exigent circumstances, therefore, seizure of First Amendment materials should observe traditional constitutional safeguards and allow a judge to focus searchingly on the question of obscenity ... It is clear that exigent circumstances may make it reasonable to permit police action without prior judicial evaluation. *Roaden* v. *Kentucky*, *supra*, 413 U.S. at 505, 93 S.Ct. 2796. We, however, are not aware of the existence of any exigent circumstances in the instant case. The FBI had ample opportunity to obtain a valid warrant based on the affidavit of Mr. Spitznagel or Agent McDermott prior to the seizure of any books or magazines. This is not a case involving contraband or objects dangerous in themselves."

The Supreme Court said in *Roaden* v. *Kentucky*, 413 U.S. 496, 504 (1973), in finding a seizure of film unreasonable:

"... The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of

expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or the commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is 'unreasonable' in the light of the values of freedom of expression."

United States v. *Benson*, 631 F.2d 1336 (8th Cir. 1980) which is cited by defendants in their memorandum is distinguishable on its facts. There, a closed leather tote bag sitting in the back seat of a vehicle was searched, although the defendant was seated in the front seat of the vehicle. The defendants also cited *United States* v. *Chadwick*, 433 U.S. 1 (1977) which is distinguishable because there the officers searched a double locked footlocker which was in the trunk of the car in which the defendant was a passenger. And *Arkansas* v. *Sanders*, 442 U.S. 753 (1979) which is cited by defendants, is distinguishable because there the officers searched an unlocked but closed suitcase which was in the trunk of the taxi in which the defendant was riding.

The defendants cite *United States* v. *Haes*, 551 F.2d 767 (1977), which is distinguishable for the same reasons as I discussed for *Walter* v. *United States*, *supra*. In *Haes* the officers obtained movie film from a private carrier and reviewed it on a projector, even though employees of the carrier had not done so.

For cases sustaining a search and seizure by government agents after a search by a private employee, see *United States* v. *Entringer*, 532 F.2d 634 (8th Cir. 1976), *cert. denied*, 429 U.S. 820 (1977); *United States* v. *Pryba*, 163 U.S. App. D.C. 389, 502 F.2d 391, 401 (2d Cir. 1974), *cert. denied*, 419 U.S. 1127 (1975); *Gold* v. *United States*, 378 F.2d 588, 590 (9th Cir. 1967).

In *United States* v. *Wright*, 641 F.2d 602 (8th Cir. 1981), cited in defendants' memorandum, officers who

were executing a search warrant for controlled substances seized a shotgun which was received in evidence. In discussing the plain view exception to the search warrant requirement the Court said at pages 605-606:

> "The first requirement, that of lawful initial intrusion, was satisfied here because the officers were acting pursuant to a valid state search warrant authorizing them to search for controlled substances in appellant's motel unit. See, e.g. *United States* v. *Johnson*, 541 F.2d 1311, 1316 (8th Cir. 1976) (per curiam) (search warrant); *United States* v. *Clark*, *supra*, 531 F.2d at 932 (search warrant).
>
> The second requirement, that of inadvertent discovery, was also met. Although the officers probably expected to find a firearm in view of ATF's information about appellant's purchase of a firearm and falsification of the federal transaction record, and in fact might have been able to obtain a search warrant for a firearm, there is no indication in the record that the search warrant for controlled substances was obtained in bad faith or that it was used as an excuse to seize the firearm in plain view and thus evade the warrant requirement. See, e.g., *United States* v. *Cutts*, 533 F.2d 1083, 1084 (8th Cir. 1976) (per curiam); *United States* v. *Carwell*, 491 F.2d 1334, 1336 (8th Cir.) (per curiam), *cert. denied*, 417 U.S. 949, 94 S.Ct. 3076, 41 L.Ed.2d 669 (1974); *cf. United States* v. *Hare*, 589 F.2d 1291, 1293-96 (6th Cir. 1979) (discussion of meaning of 'inadvertence' in Coolidge). 'We have previously held lawful the warrantless seizure of weapons or contraband during the course of an otherwise authorized search, not withstanding that the discovery was anticipated and that a warrant could have been obtained.' *United States* v. *Cutts*, *supra*, 535 F.2d at 1084 (citations omitted)."

Defendants cite *Unsited States* v. *Lester*, ____ F.2d ____, Slip Op. 80-2129 (8th Cir. May 14, 1981) in their

memorandum. In that case the Court sustained the seizure of defendant's bloodstained pants and boots three hours after he had been placed in custody for detoxification. The defendant was a murder suspect and witnesses had earlier told officers that the defendant had been drinking with the deceased and that they had observed blood on his pants and boots. The Court stated at pages 5-6:

> "Probable cause to arrest appellant arose when the officers observed the blood and hair on Lester's pants and boots, having recently been informed of his possible participation in the assault upon Owen Wise Spirit. In essence, appellant's bloodstained clothing was within the plain view of the arresting officers.
>
> It is well established that evidence falling within the plain view of an officer properly in a position to perceive the view is subject to seizure and admissible as evidence. *United States* v. *Johnson*, 541 F.2d 1311, 1316 (8th Cir. 1976). Evidence is within the plain view rule where the initial intrusion resulting in the 'plain view' is lawful, discovery of the evidence is 'inadvertent,' and the incriminating nature of the evidence is 'immediately apparent.' *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 466.
>
> These requirements were clearly satisfied in the present case. The initial entry preceding the arrest falls within the consent exception to the search warrant requirement. Discovery of the blood on appellant's clothing, which was obvious and open, was inadvertent. And the incriminating nature of the bloodstains on the clothing of one suspected of committing an assault was obvious.
>
> These circumstances do not give rise to the inference that the arrest was effected for the purpose of creating an excuse to search. Nor can it be inferred that the officers used the detoxification charge as a pretext to further their quest for evidence relating

to the murder. *Klingler* v. *United States*, 409 F.2d 299, 304-05 (8th Cir.) *cert. denied*, 396 U.S. 859 (1969) (vagrancy arrest). Rather, it appears that the seizure of the evidence in this case, already in plain view of the arresting and custodial officers, was merely a normal incident to a custodial arrest."

Defendants cite *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971) in their memorandum; that case is distinguishable on its facts. There the police searched a murder suspect's house and car two weeks after a murder. The defendant was in his home when arrested, and his car, which was in his driveway, was towed in by the police two hours after the arrest. Although the state attorney general was in charge of the investigation, he signed a search warrant as an acting justice of the peace. The Court held that the search warrant was not issued by a neutral and detached magistrate. The state then tried to justify the search of the car because it had been "in plain view" in the driveway. In holding that the search of the car was illegal the Court said at p. 471-472:

"... The initial intrusion may, of course, be legitimate not by a warrant but by one of the exceptions to the warrant requirement, such as hot pursuit or search incident to lawful arrest. But to extend the scope of such an intrusion to the seizure of objects—*not contraband nor stolen nor dangerous in themselves*—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

In the light of what has been said, it is apparent that the 'plain view' exception cannot justify the police seizure of the Pontiac car in this case. The police had ample opportunity to obtain a valid warrant; they knew the automobile's exact description and location well in advance; they intended to seize

it when they came upon Collidge's property. *And this is not a case involving contraband or stolen goods or objects dangerous in themselves.*" (Emphasis added.)

United States v. *Johnson*, 637 F.2d 532 (8th Cir. 1980), cited by defendants, is distinguishable on its facts. *Johnson* involved a "Terry" search of the defendant and a search of the defendant's duffle bag, which was sitting a few feet away, due to exigent circumstances.

The examination of the package at the airport was not an illegal search and seizure and the motions to suppress should not be granted on that ground. Because of this determination, the subsequent search of the home of the defendants need not be suppressed because of any taint or poison fruit under *Wong Son* v. *United States*, 371 U.S. 471 (1963). The affidavit in support of the search warrant was not based upon evidence obtained as a result of a prior unlawful, warrantless search.

The defendants have not made a general attack on the adequacy of the affidavit upon which the search warrant is based; but even if they had, the affidavit on its face clearly shows probable cause for the issuance of the warrant.

Lastly, the defendants attack the manner in which the search warrant was executed, relying on an alleged violation by the officers of Title 18, United States Code, Section 3109 which states as follows:

> "§ 3109. Breaking doors or windows for entry or exit
>
> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

After Agent Lewis identified himself to defendnat Brad Jacobsen, Jacobsen slammed the door into his face, breaking his glasses and knocking him off the door stoop. A number of officers started yelling "Police—open up." Agent Lewis heard footsteps running up the steps and heard Brad Jacobsen yell "it's the police—flush it." Even though the officers did not say that they were executing a search warrant, and neither Mr. nor Mrs. Jacobsen were heard to orally refuse admittance, I find that there was no violation of 18 U.S.C. § 3109.

Ker v. *California*, 374 U.S. 23 (1963), involved a probable cause arrest without a warrant by state officers, and a search incidental thereto, at the defendants' apartment. In an opinion by Justice Brennan, concurring in part with the opinion of Justice Clark, it is stated at p. 47:

> "Even if probable cause for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), a. then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted."

Subsequently, in *Sabbath* v. *United States*, 391 U.S. 585, 591 n.8 (1968), the Court said it recognized that there were exceptions which allowed an entry without a warrant and said there was little reason why such exceptions should not apply to Section 3109.:

> "Exceptions to any possible constitutional rule relating to announcement and entry have been rec-

ognized, see *Ker* v. *California*, *supra*, at 47 (opinion of Brennan, J.) and there is little reason why those limited exceptions might not also apply to § 3109, since they existed at common law, of which the statute is a codification. See generally *Blakey*, n.5, *supra*.

The Court in *United States* v. *Smith*, 520 F.2d 74, 171 U.S. App. D.C. 342 (1975), cited by the defendants in their memorandum, remanded the case because there had not been a finding by the trial court as to a refusal of admittance; the case is distinguishable on its facts. However the Court stated at p. 78:

> "We think it follows from two decisions of this court involving a particular search and seizure that the absence of a finding of refusal is fatal to the validity of a search and seizure, unless exisgent circumstances dispensed with the need therefor, a matter to be separately discussed in Part IV, *infra*."

The Court went on to state at p. 80:

> "The testimony respecting the forced entry calls for some further consideration in light of the reference in the cases to exigent circumstnaces. We have noted that the stipulation states that it was only after the officers heard "hurried movement" from within the apartment, a stirring and sort of shuffling, which one officer considered to be movement away from the door, was resort had to the sledge hammer. This testimony not only bears on whether there was a refusal of admittance; it also suggests the possibility that exigent circumstances might be found to have dispensed with the need for full compliance with the terms of section 3109. The denial of the motion to suppress did not rest upon this theory, however, and, therefore, cannot be sustained by reason of it in the absence of a finding and conclusions in that regard. The District Court nevertheless is not precluded from considering the possibility on the remand ... In the second *Masi-*

ello case, however, our own court, though not relieving the trial court of the necessity of findings and conclusions, on its review of those made by the District Court after the remand stated:

> 'Where, as here, after giving the required notice the officers hear sounds which indicate to them that the evidence sought by the warrant may be in process of destruction, exceution of the warrant need not be deferred long enough to allow completion of the process.'"

Defendant cites *United States* v. *Mendoza*, 433 F.2d 89 (sic 891), (5th Cir. 1970), *cert. denied*, 401 U.S. 843. The facts of that case are dissimilar and not controlling here. However, the Court in Mendoza did say at p. 895:

> "An alleged violation of 18 U.S.C. § 3109 must be judged in light of the particular circumstances surrounding the execution of the warrant. *Jones* v. *United States*, 1960, 362 U.S. 257, 272, 80 S.Ct. 725, 4 L.Ed. 2d 697."

The case of *United States* v. *Murrie*, 534 F.2d 695 (6th Cir. 1976) is of no help. That opinion turned on an erroneous application of the burden of proof where the defendant had testified that there was a sudden and unannounced breaking which made out a *prima facie* case of a no knock violation. The case was remanded for a further consideration of the motion to suppress by the trial court.

In *United States* v. *Boyer*, 574 F.2d 951, 954 (8th Cir. 1978) the Court said:

> "Nor is Boyer assisted by reference to the principles of 18 U.S.C. § 3109. In *Miller, supra*, 357 U.S. at 310, 78 S.Ct. at 1196, the Supreme Court recognized that if the officers are justified 'in being virtually certain that the *petitioner* already knows their purpose so that an announcement would be a useless gesture' (our emphasis), the requirement that the officers state their purpose might be relaxed. This was strengthened in *Sabbath, supra*,

391 U.S. at 591 n.8, 88 S.Ct. at 1759, where the Court approved the limited exceptions contained in Justice 374 U.S. 23, 47 [83 S.Ct. 1623, 1636, 10 L.Ed.2d 726] (1963). Those exceptions include, 'where the persons within already know of the officers' authority and purpose."

The same Court said in *United States* v. *Kulscar*, 586 F.2d 1283, 1286 (8th Cir. 1978):

> "While the agents knocked and announced 'police' repeatedly before forcing both the front door and the door to Kulcsar's apartment, they failed to state expressly that they were there to arrest him. However, our recent decision in *United States* v. *Boyer*, 574 F.2d 951 (8th Cir. 1978) establishes that announcement of purpose is excused when it would be a useless or futile gesture. If 'the persons within already know of the officers' authority and purpose' or 'if the officers are justified 'in being virtually certain that the petitioner already knows their purpose." announcement of purpose is unnecessary. *Id* at 954, *citing Ker* v. *California*, 374 U.S. 23, 47, 83 S.Ct. 1623, 10 L.Ed. 2d 726 (1963); *Miller* v. *United States*, 357 U.S. 301, 310, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958). Thus, "[t]he exceptions to the announcement of purpose by arresting officers depend on the officers' knowledge and belief." *United States* v. *Boyer*, *supra*, 574 F.2d at 954. The district court determined that the agents were certain Kulcsar knew their purpose. This finding was not clearly erroneous."

I find that the defendants knew of the authority and purpose of the officers and that exigent circumstances existed for entry without any further attempt by the officers to literally comply with 18 U.S.C. § 3109. Defendant Brad Jacobsen had already slammed the door into the face of Agent Lewis and yelled "it's the police—flush it." It would be hard to imagine a more explicit acknowledgement by a defendant of his knowledge of the purpose for the presence of law

enforcement officers. The defendants' Motion to Suppress should be denied.

/s/ _____

FLOYD E. BOLINE
UNITED STATES MAGISTRATE

DATED: JUNE 24, 1981

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No. 82-1167

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN and DONNA MARIE JACOBSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

MARK W. PETERSON
Suite 500 Builders Exchange
609 Second Avenue South
Minneapolis, Minnesota 55402
(612) 339-1431

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 12, 1983
CERTIORARI GRANTED MARCH 7, 1983

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

RELEVANT DOCKET ENTRIES

JACOBSEN, BRAD THOMAS

5-4-81

DATE	PROCEEDINGS
5-8-81	1) INDICTMENT (Bond made 5-4-81 $1000 surety by Allied Fidelity Ins. Co. Judge MacLaughlin Assignment 468 on the Master Criminal List.
5-14-81	2) ARRAIGNMENT before Magistrate Boline. Plea of Not Guilty entered to all counts.
5-21-81	6) MINUTES OF PROCEEDINGS before Magistrate Boline. Defendant's oral motion for continuance, granted. Defendant's motion for disclosure of intercepted wire or oral communications, motion to suppress, motion to permit inspection of grand jury minutes, mo-

DATE	PROCEEDINGS

tion for notice of other offenses and motion for discovery and inspection—argued, submitted and taken under advisement.

5-26-81 6a) MIN. OF PROCEEDINGS before Mag. Boline —Cont. hearing deft. suppression mo, argued, submitted and taken under advisement.

6-24-81 10) REPORT AND RECOMMENDATION of Magistrate Boline that the defendant's Motion to suppress should be denied.

6-29-81 12) OBJECTION OF THE DEFENDANT to the Report and Recommendation of Magistrate Boline.

7-6-81 13) REPORTERS TRANSCRIPT OF PROCEEDINGS HELD 5-26-81 BEFORE MAGISTRATE BOLINE. (Wicklander-R.) (Partial Transcript)

7-21-81 (14) REPORTERS TRANSCRIPT OF PROCEEDINGS Held 5-26-81 (Partial Transcript on Suppression Hearing, other in Item 13)

7-22-81 14) ORDER (MacLaughlin, J.) that the defendant's objections to the Report and Recommendation are overruled, the report and recommendation as supplemented herein is adopted, and the defendant's Motion to Suppress is denied.

24) VERDICT OF GUILTY [Brad Jacobsen] to Count I, II and III of the Indictment. VERDICT OF GUILTY [Donna Jacobsen] to Count I and III of Indictment.

10-16-81 30) SENTENCE IS IMPOSED [Brad Jacobsen]: (MacLaughlin, J-Stafford, R.) Count I. Imprisonment for 12 months; special parole term of 3 years. Count II; Imprisonment for 6 months, consecutive to sentence on Count I. Count III; imprisonment for 12 months, concurrent with sentence on Count I. Informed of right to appeal. Execution of sentence is stayed until Monday, October 26, 1981, at which time the defendant shall surrender to the U.S. Marshal's Office in Minneapolis, Min-

DATE	PROCEEDINGS

nesota. If a timely appeal is filed the execution of the sentence shall be stayed pending appeal to the Eighth Circuit Court of Appeals.

10-16-81 35) SENTENCE IS IMPOSED [Donna Jacobsen]: (MacLaughlin, J-Stafford, R.) Court finds that the defendant will not benefit under Federal Youth Corrections Act. As to Count I. Imprisonment for 12 months and on condition that the defendant be confined in a jail type institution for 3 months, the execution of the remainder of the sentence of imprisonment is hereby suspended and the defendant is placed on probation for 3 years. Special parole term of 3 years. As to Count III: imprisonment for 12 months and on the condition that the defendant be confined in a jail type institution for 3 months, the remainder of the sentence of imprisonment is hereby suspended and the defendant placed on probation for 3 years. Sentence on Count III to run concurrently with sentence as to Count I. The defendant informed of right to appeal. Court recommends the Hennepin County Adult Corrections Facility as the place for service of the sentence Court recommends Hennepin County Adult Corrections Facility as the place for service of the sentence. Court recommends Henn. County Adult Correction Facility. Sentence execution stayed to Monday, Oct. 26, 1981. If timely appeal filed execution of sentence will be stayed pending appeal.

ISSUED Jdgt. and Commitment and dlvd. two c/c to U.S. Marshal two c/c to U.S. Probation, one c/c to U.S. Attorney and one c/c to U.S. Bureau of Prisons.

10-26-81 36) NOTICE OF APPEAL Receipt 20927

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Cr. No. 4-81-53

UNITED STATES OF AMERICA, PLAINTIFF

vs.

DONNA JACOBSEN and BRAD JACOBSEN, DEFENDANTS

HEARING ON SUPPRESSION MOTIONS

Before:

HON. FLOYD E. BOLINE,
United States Magistrate

Minneapolis, Minnesota

May 26, 1981

* * * *

[2] APPEARANCES:

On Behalf of the Government

John Lee
Assistant United States Attorney
Minneapolis, Minnesota

On Behalf of the Defendant Donna Jacobson

Mark Peterson, Esq.
Minneapolis, Minnesota

On Behalf of the Defendant Brad Jacobson

Earl Gray, Esq.
Minneapolis, Minnesota

Defendants Donna Jacobson and Brad Jacobson present

JAMES LEWIS

called as a witness by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LEE:

Q Would you state your name, please?

A James Lewis, L-e-w-i-s.

Q Your occupation?

A Special agent, Drug Enforcement Administration.

[3] Q And are you assigned locally?

A Yes.

Q How long have you been a Drug Enforcement Administration agent?

A Eight years.

Q Agent Lewis, directing your attention to May 1, 1981, did you have occasion on that date to participate in an investigation involving Brad Jacobson?

A Yes.

Q And could you tell me did you determine in the course of the investigation the place of his residence?

A Yes.

Q And what did you determine in that regard?

A It was 7300 West I believe 135th Street.

Q And is that in the metropolitan area?

A Apple Valley, yes.

Q Did you go to that location that day?

A Yes.

Q Could you tell us what's located there?

A A single family residence.

Q Do you remember approximately when you would have first gone to that location on May 1?

A We arrived in the area about 2:30, 2:40.

Q In the afternoon?

A Yes.

[4] Q Prior to arriving in the area at that time, had you been in contact with other agents?

A Yes.

Q At or about 2:40, did you meet with other agents at this location or close to it?

A Yes, I did.

Q And what occurred at that time?

A We basically had an informal meeting as to what was going to occur that afternoon.

Q And did that meeting involve any documents such as a search warrant?

A Yes.

Q And could you tell me where you would have first observed a search warrant, who had it?

A I first observed the search warrant at the corner of Cliff Road and Cedar I believe, and Special Agent Hait had it.

MR. GRAY: Sir, would you speak up? I can't hear you. I didn't hear you at all, as a matter of fact.

THE WITNESS: I first observed the document at Cedar and Cliff Road, and Special Agent Hait had it.

BY MR. LEE:

Q Do you recall what the document specified be searched?

A The residence of Brad Jacobson.

[5] Q And after you saw the document as you've described, could you tell us what if anything you then did?

A We then went to the area of the residence, and at that time a controlled delivery of a package was made by myself.

Q At approximately what time?

A 2:45.

Q And was that delivery made to the residence?

A Yes, it was.

Q Thereafter did you have occasion to return to the residence?

A Yes, approximately an hour later.

Q Would you have gone to the residence alone at that time or with someone else?

A There were other people involved, yes.

Q Could you give us some idea of the number?

A There were 4 around the house, I think one at each corner, and then there were about 4 or 5 behind me, both uniformed and plain clothes officers.

Q Are you aware who would have first approached the house at approximately 3:40?

A Myself.

Q And could you describe what you did at that time?

A I approached the front door with the original airway bill for the package that was controlled delivered [6] earlier along with my credentials.

I knocked on the door several times. Finally Mr. Jacobson answered the door. I have the airway bill over the credentials. He opened the door about 8 inches. It's a door that has no screen door. It's just a main door. I said to Mr. Jacobson, "I was here earlier and had you sign the wrong receipt," and then I pulled my credentials out and said, "Police."

Q What are you holding in your hand as you're testifying (indicating)?

A A badge of the Department of Justice, Drug Enforcement Administration, identifying myself as a special agent with that organization.

Q And what did you specifically—what is the badge attached to?

A A credential case.

Q And specifically what did you do if anything with that badge and credential case at the time that you confronted Mr. Jacobson as you've described?

A I showed it to him like this (indicating).

Q And what if anything did you say as you extended it toward him?

A Police.

Q What if any observation did you then make of Mr. Jacobson?

[7] A Mr. Jacobson slammed the door in my face breaking my glasses, knocking me off the porch.

At the same time I heard the pounding of feet on the stairs, and at the same time a shout, "It's the police. Flush it."

Q Could you tell us were you on the front steps with anyone at that time?

A No. The people, the 4 or 5 that were with me, behind me, were up against the front of the house back maybe 5-6 feet out of view of the door.

Q Could you tell us why you had gone to the front door at the time that you described?

A To execute the search warrant.

Q Could you tell us do you have a general method of approaching and entering a residence to execute a search warrant?

MR. PETERSON: Object to that as irrelevant.

THE COURT: Overruled.

THE WITNESS: Well, basically the execution of a search warrant, the most important thing is safety of the officers. We attempt to make entry into the place in the safest manner possible.

BY MR. LEE:

Q Do you have a custom as to whether or not you knock on a door at the time you attempt to execute a search warrant?

[8] A We always attempt to knock on the door, announce our presence and purpose.

Q In this instance did you follow your prescribed procedure?

A Yes.

Q And could you describe how specifically you followed the procedure?

A As I've testified, I knocked on the door, and when it was opened, I identified myself, and at that time I wasn't allowed to go much further.

Q What prevented you from doing so?

A Having the door slammed in my face.

Q Can you tell us after this occurred what if anything then occurred in connection with the search warrant?

A Several of the officers starting yelling, "Police," as did myself, "Open up."

When it was apparent that that wasn't going to happen, the sound of the running footsteps and so on, the door was kicked in.

Q What occurred then?

A We made entry into the residence. I personally went to the lower level of the house, and some of the officers followed me and some of the others went to the upper level of the house.

Q Could you tell us what if anything was done after the [9] officers and agents entered the house?

A We searched the house yelling, "Police," I think at every doorway, nook and cranny, looking for the occupants.

Q Could you tell us whether or not the search warrant was executed?

A Yes, it was.

MR. LEE: I would have no further questions of the witness at this time.

THE COURT: Do you want to cross examine, gentlemen?

CROSS-EXAMINATION

BY MR. GRAY:

Q Agent Lewis, when you arrived the first time at the Jacobson residence, you testified it was about 2:45 p.m.; is that correct?

A That's when I went to the door, yes.

Q And that was what you described as your "controlled delivery" of a package; is that right?

A That's right.

Q And at that time when you made that controlled delivery, did you do it under the disguise of a Federal Express agent?

MR. LEE: I'd object to the relevance for the purpose of this hearing.

[10] THE COURT: Sustained.

BY MR. GRAY:

Q The vehicle that you were driving the first time at the Jacobson residence was the same vehicle that you drove the second time there; is that right Agent Lewis?

A That's correct.

Q And the second time you were there, too, what you testified to, to execute the search warrant; you were at the front door in the same manner and same description and presence as you were in the first time; is that right?

MR. LEE: I'd object to the relevance of the question.

THE COURT: I'll overrule that.

(Pause.)

MR. GRAY: I'll rephrase it.

BY MR. GRAY:

Q Was there anything different the second time that you were at the Jacobson residence than the first time except that the first time you had a package?

A I was there to execute the search warrant.

Q Well, the search warrant was already issued at the first arrival there, was it not?

A That's correct.

Q Okay. Now, maybe you can answer me this: Was there anything different except for the package that you had [11] in your hand the second time that you were at the door? Did you look the same, number one?

A Yes.

Q And did you have the same vehicle out in front that you had the first time?

A Yes.

Q And you had the same air freight bill; is that right?

A That's correct.

Q And the door was open, is that right, when you knocked on it the second time?

A After repeatedly knocking, yes, it was opened.

Q What does "repeatedly" mean? How many times did you knock?

A Probably 8 times.

Q And all during this 8 times you knocked, you didn't say in any manner that you were the police and you were there to execute a search warrant, did you?

A No.

Q As I understand it, the door was opened you said 8 inches wide, it that right?

A (Witness nods head affirmatively.)

Q And at that point you testified that you told the man on the other side of the door, Mr. Jacobson, that you had to have him sign something else with respect to the air freight bill; is that right?

[12] A Yes, it was in the same sentence which was ended with, "Police," and showing him my credentials.

Q Agent Lewis, did you say that you wanted him to sign the air freight bill or not?

A That's correct.

Q And at the end of that sentence you said, "Police," is that right?

A That's correct.

Q The door slammed, is that right?

A That's correct.

Q And this door opens which way, out or in, in other words?

A In.

Q In? So your testimony is that you had your glasses broken in this incident; is that right?

A Yes.

Q If I understand it right, then when you said that you got an air freight bill to sign and you're saying, "police," you must have at the same time in a motion been entering the residence; is that right?

A No, I was leaning towards him to make sure he got a good look at my badge.

Q You were leaning towards him with your hands?

A One hand, yes.

Q All right. And how did it happen that your glasses got [13] broken then?

A As I was leaning—there was no screen door on the door.

Q All right. You testified to that.

A And I'm inside the line of the door frame like so (indicating), and I suppose the most forward part of my body would be the tips of my fingers and the corner of my head.

Q Well, did you hurt your hand any?

A No.

Q Well, perhaps I'll ask it again: When you said that you were there to have another freight bill signed, you were in one motion trying to enter the residence also?

A No.

Q Were you trying to lean forward and get inside the residence in any manner?

A No.

Q But notwithstanding that, your glasses broke when he shut the door; is that right?

A That's correct.

Q Is it possible not to have your body inside that doorway without—is that possible and not breaking your glasses?

MR. LEE: I'd object. The question is calling for speculation.

THE COURT: No, I'll let him answer.

[14] THE WITNESS: It was in my case.

BY MR. GRAY:

Q The door doesn't open both ways, does it?

A No.

Q It doesn't open this way this (indicating)?

A No.

Q And when the door is shut, it's shut; it doesn't have any give in it, does it?

A No, it didn't.

Q Okay.

(Pause.)

Do you have a copy of the indictment there, Agent Lewis?

A No.

Q Well, I'll show you this (indicating). I'll show you the second page of the indictment in connection with the overt acts and ask ou to read to yourself the second overt act.

A Yes.

Q All right. Now, when the door was shut, there wasn't any statement like, "Police, flush it," was there?

A Not by me.

Q No, by anybody.

MR. LEE: I'd object to the question as lacking specificity as to time.

[15] MR. GRAY: Excuse me.

BY MR. GRAY:

Q When the door slammed in your face and your glasses were broken, you didn't hear anybody say, "Police, flush it," did you?

A Yes, I did.

Q At that point in time you heard that?

A Yes.

Q When the door was slammed in your face, did you testify that you ended up down on the—off of the sidewalk?

A No, I don't believe I did.

Q Well, where did you end up?

A The door stoop.

Q Pardon me?

A The door stoop. I was knocked back off the door stoop or step.

Q Were you knocked down?

A To the front of the house but to the side of the step.

Q And were you knocked down at that time?

A No.

Q Are those the same glasses you had on the day of this incident?

A No.

Q Going gack to the original observation of the package that was delivered, were you involved in that, Agent [16] Lewis?

A Observation where?

MR. LEE: I'd object to the question as lacking specificity.

BY MR. GRAY:

Q All right. The Federal Express people notified the DEA or Drug Enforcement Administration about this package; isn't that right?

A That's correct.

Q And were you the one that they notified?

MR. LEE: I'd object to the relevance as to the no-knock issue.

MR. GRAY: If you want to recall him on the other matter, we'll do that.

THE COURT: Overruled.

BY MR. GRAY:

Q Were you the agent that was called by the Federal Express to go out and observe the package?

A Yes.

Q And at the time you called, where were you, Agent Lewis?

A My residence.

Q Okay. You weren't at the airport?

A No.

Q And who called you?

[17] A Edgar Davis.

Q Edgar Davis, and who is that?

A He is with Federal Express I think in their security department.

Q Okay. How did it happen that he got your name? Do you know?

MR. LEE: Your honor, I'd object to the line of inquiry in absence of some offer of proof.

I believe we have a search warrant here, and I believe the law is clear that the warrant if issued is to be examined within its four corners.

I think Mr. Gray is pursuing a line of inquiry that would apparently be intended to impeach the warrant, and in the absence of his satisfying the threshold requirement, I would object to this line of inquiry.

THE COURT: Sustained. There's no relevance to that question.

I believe the only issue here to go into is whether federal agents searched that package prior to the time it was delivered to the home.

MR. GRAY: All right, your honor.

BY MR. GRAY:

Q Where did you go first to observe the package? Where did you go? Was it the Federal Express Company?

A Minneapolis Airport, Federal Express.

[18] Q Minneapolis Airport. And at the time you were there, where was the package at in the airport?

A In their offices.

Q All right. And could you describe how that package was packaged?

A It was brown wrapping paper with an air bill on it, several fragile I believe stamped on the wrapping paper. The wrapping paper was over a cardboard box, oh, ten inches long, six by six; something like that, and there were newspapers inside, and then there was a oh, a duck tape tube maybe ten inches long inside, and inside that were I think four plastic Ziplock bags with the last one containing white powder.

Q And how did you find that out? Did you go through the package when you got there?

A No, it was already opened.

Q It was already opened, did you say?

A Yes.

Q Was it opened to the extent that you just described where all you had to do was walk in and look at the baggie with the white powder in it?

A Yes, it was when I got there.

Q In other words, when you went into the Federal Express Company, it was in plain sight; it was just laying out there; is that right?

[19] A I believe so.

Q Well, do you believe so or do you recall?

It's sort of important.

A I know the wrapping was in plain sight. The box was in plain sight. The newspaper was in plain sight, and the duck tape tube was in plain sight, and I remember seeing some plastic bags.

I don't remember whether white powder was right there in the that plastic bag or—

Q When you said that, do you mean that it was spread out all over a desk or something, that each thing was in a different department?

MR. LEE: I'd object to the form of the question. It asks for the agent's observation.

BY MR. GRAY:

Q How did you observe this package? Do you remember?

A Setting on a desk opened up.

Q What do you mean by "opened up"?

A The wrapping was partially off. The box was exposed. The newspaper was exposed. The duck tape was exposed, and the plastic baggies were exposed.

Q Well, do you remember seeing a white powdery substance? Was that exposed?

A Yes, I saw it.

Q Okay.

[20] MR. GRAY: Do you have pictures of that, Mr. Lee? Do you have those photographs here?

MR. LEE: No, I believe that Mr. Hait took them with him on last Thursday.

BY MR. GRAY:

Q Did you take a photograph of the package as you originally saw it, Agent Lewis?

A No.

Q You didn't?

Did you take a photograph of the white powdery substance at any time during this investigation?

A I think we took a photograph of the plastic bag with white powder in it once we had taken the package back to our office.

Q Once you took the package back to your office?

A Yes.

Q When was that? After the execution of the search warrant?

A No, that was prior to the controlled delivery.

Q Oh. In other words, you took the package at Federal Express and you took that down to the DEA office; is that right?

A No, I took it to another office at the airport.

Q Pardon me?

A I took it to another office at the airport.

[21] Q Well, you said, "Down to our office." Is that the DEA's office?

A At the airport, that's correct.

Q Your own office at the airport?

A That's correct.

Q And who was with you when you did that?

A Jerry Kramer, Tom Olby and I think by that time Agent Tomseck had arrived.

Q Did you go through the package once you got it to your office?

A We repackaged it.

Q Who obtained the warrant?

MR. LEE: I'd object to the relevance.

BY MR. GRAY:

Q Well, was David Hait—excuse me. I'll withdraw the question.

Was David Hait involved in the investigation and obtaining the search warrant; is that correct?

A. That's correct.

Q Okay. And I take it that Edgar Davis was an individual from Chicago; is that a fair statement?

A Yes.

Q And you never met him at the Federal Express Company here in Minneapolis; is that right?

A That's right.

[22] MR. LEE: Again I'd renew the objection to relevance.

BY MR. GRAY:

Q Who did you meet at the Federal Express office in Minneapolis when you first saw the package?

A The manager of the facility.

Q And who was that? Do you remember his name?

A I know his first name is Dan.

Q And where was the package when you first saw it?

A Oh, either his desk or it was on a desk in one of their offices.

I don't know whose office it was.

Q Did you just walk right in and you saw it there on a desk; is that correct?

A Yes.

Q Did you notice any damage on the package?

A Yes.

Q Where was the damage?

A The end of the box had been ripped. The wrapper, the brown wrapper, had been ripped, and the box also had been ripped.

MR. GRAY: I have no further questions.

CROSS-EXAMINATION

BY MR. PETERSON:

Q Agent Lewis, what type of vehicle were you driving when [23] you travelled to the Jacobson residence on May 12?

MR. LEE: I'd object to the question as to the nature of discovery.

THE COURT: Overruled.

THE WITNESS: A van.

BY MR. PETERSON:

Q Was it a DEA vehicle or Federal Express van?

A Neither.

Q What kind of van was it?

A State.

Q BCA van?

A That's correct.

Q And on both occasions when you travelled to the Jacobson residence on that day, that was the van you were driving?

A That's correct.

Q And I believe you testified that when you approached the door of the Jacobson residence the second time, no other agent was present with you at the door; is that correct?

A Well, they were 5 or 6 feet behind me, yes.

Q And how were you dressed when you approached the door?

A Blue pants, blue shirt, blue jacket.

Q Well, was it a Federal Express uniform?

A It was my own personal clothes.

Q Did it look like work clothes or did it look like casual [24] clothes?

(Pause.)

A Blue pants, blue shirt and blue jacket; I guess you could construe that as work clothes; my own personal clothing.

Q Well, your purpose in dressing in that fashion was to look like some type of delivery person; correct?

A Yes.

Q And when you had been there previous time and talked to Mrs. Jacobson, you had represented yourself to be a Federal Express employee; correct?

MR. LEE: I'd object to the relevance.

THE COURT: Overruled.

THE WITNESS: That incorrect. I just stated, "I've got a package here for Mr. Jacobson."

BY MR. PETERSON:

Q And asked her to sign something; correct?

A That's correct.

Q And when you approached the door the second time, the search warrant time, perhaps I missed it, but you had the bill of lading or some type of shipping document in one hand; is that correct?

A That's correct.

Q And your billfold containing your identification was not out at that time; is that correct?

[25] A Yes, it was.

Q In the same hand or in a different hand?

(Pause.)

A It was like this (indicating) only the bill of lading was larger (indicating).

MR. PETERSON: For the record you're indicating that your billfold containing the identification badge was held by you in your right hand and over the billfold, in other words, covering the badge was the bill of lading; is that correct?

THE WITNESS: That's correct.

BY MR. PETERSON:

Q Okay. When Mr. Jacobson answered the door, you were still holding the billfold and the bill of lading in the fashion that I just described; is that correct?

A That's correct.

Q And the first words that you said were that his wife had signed the wrong receipt and "would you please sign this," or something to that effect; is that correct?

A I said, "I think I got the wrong receipt signed. Police."

Q Okay.

MR. LEE: Could the record reflect what if anything Agent Lewis did with relation to the badge and air bill at that time?

BY MR. PETERSON:

[26] Q Agent Lewis, for the record, you've indicated that during the time you were saying what you just said, you moved your right hand forward removing the bill of lading from the cover of the badge and thereby showing the badge to Mr. Jacobson; correct?

A That's correct.

Q When you said, "I think I've got the wrong receipt," that was a lie, was it not?

A I didn't say that. I said, "I think I got the wrong receipt signed. Police."

Q Okay. When you said, "I think I've got the wrong receipt signed, police." That was a lie, was it not?

MR. LEE: I'd object to the relevance.

THE COURT: Sustained.

BY MR. PETERSON:

Q In terms of identifying yourself, all you said was the word, "Police," is that correct?

A That's correct.

Q You did not say you were a Federal Drug Enforcement Administration Agent; correct?

A No, I did not.

Q And you did not say that you were present to execute a search warrant; is that correct?

A No, I didn't have time.

Q But the answer to my question is yes, you did not say [27] that?

A That's correct.

Q By the way, the warrant which you had wasn't a no-knock warrant; is that correct?

MR. LEE: I'd object. The warrant I believe speaks for itself.

MR. PETERSON: I don't believe the warrant's in evidence.

MR. LEE: I offered it to his honor on Thursday. If we'd like to have it a formal exhibit, I would offer it as such.

THE COURT: I'm sorry. I did not realize it was part of the file.

(A discussion was held off the record.)

BY MR. PETERSON:

Q Agent Lewis, you testified that after the door was then slammed in your face that you heard footsteps inside; is that correct?

A Yes, running on stairs.

Q Running on the stairs?

A Yes.

Q And when you later searched the house, did you discern that the stairway to the second floor of the residence is carpeted?

A Yes.

[28] Q What type of shoes was Mr. Jacobson wearing on May 1st? Do you recall?

A No.

Q You then testified that you waited for what period of time before you kicked the door in?

A Well, we yelled, "Police. Open up," about twice and then we kicked the door in.

Q So we're talking in terms of 5 to 10 seconds; is that correct?

A Probably.

Q And this 5 to 10 second period would have been the period during which you heard the footsteps running; is that correct?

A Yeah, it was immediately after the door slammed and the, "Police, flush it." "It's the police. Flush it."

Q Now, going back to your previous involvement with the package at the airport, do you recall what time you arrived at the Federal Express Offices at the Minneapolis Airport?

A I think myself I arrived 10:15 to 10:30; somewhere right in there.

Q Were you with other agents at that time?

A Not when I arrived. There was already an agent there. I didn't arrive with him.

Q I see. Another agent was already at the Federal Express [29] Office?

A That's correct.

Q Who was that?

A Agent Kramer.

Q Was he in the office with the package at the time that you arrived?

A Yes.

Q Did you discuss what if anything he had done with the package prior to your arrival?

A Yes.

Q What did you discuss?

A He showed me the field test for the presence of cocaine which was positive.

Q What else did he tell you?

A What he had observed when he drove by the Jacobson's residence earlier that morning.

Q I mean relevant to the package?

A Oh, nothing really.

Q You said, "Nothing really"?

A I can't think of anything that was really discussed, no.

Q Would your report reflect it?

MR. LEE: I'd object to the relevance of that.

MR. PETERSON: I haven't asked for the report. I'm asking if his report would reflect it so that he can refresh his recollection.

[30] THE WITNESS: I don't think there's anything to reflect or refresh. We just didn't have a conversation.

BY MR. PETERSON:

Q So, to the best of your recollection, all that you discussed with Agent Kramer relative to his involvement with the package was that he had performed a field test which proved positive for cocaine?

A Yes.

Q He didn't tell you that he had conducted any other examination of the package?

A Other than it was open when he arrived and he'd tested the drugs.

Q Did he tell you that he opened it any further or in any other way altered the appearance or condition of the package?

A No, he hadn't.

Q After you arrived, what examination did you conduct of the package?

A I looked at it, looked at the airway bill, the way it was packaged, signed a receipt for it, and took it.

Q When you say you looked at the way it was packaged, did you do that physically or visually?

A Both.

Q Okay. What physical examination did you conduct of the package?

[31] A Picking it up and looking at it.

Q Did you physically enter the inside of the package with your hand or any other object?

A It was already opened.

Q That's not my question.

Did you go inside it?

A Well, again, the box is sitting there with it open, and the duck tape container was laying right there. I just reached over and picked it up.

Q Picked up the duck tape container or the package?

A Both.

Q So they remained together?

A Well, I separated them to look at both the airway bill and the package.

Q No, I'm talking about did you separate the duck tape—I take it the duck tape container contained the cocaine; is that correct?

A That's correct.

Q Did you remove the duck tape container from the package?

A Yes.

Q And you did that at the Federal Express Office?

A Yes.

Q And after you removed the duck tape container, that in turn contained four ziplock bags; is that correct?

A That's correct.

[32] Q And, therefore, in order to get to the cocaine which was in the innermost ziplock bag, you had to open four other ziplock bags; correct?

A Yes.

Q Now, the duck tape container which contained the ziplock baggies was a complete container to the extent that the duck tape went all around the ziplock baggies, did it not?

A That's correct.

Q So I take it that to get to the cocaine which was inside somehow that duck tape had to be separated or cut or however it happened; is that correct?

A Yes, it was already cut open when I got there.

Q It was already cut open?

A Yes.

Q Did you know who did that?

A Federal Express.

Q Did they tell you that?

A Yes.

Q Who told you that?

A One of the two people there, either the manager or the operations manager.

I don't remember which. They were both present.

Q What else did they tell you they had done to alter the condition of the package?

[33] MR. LEE: I'd object to the line of inquiry.

THE COURT: Overruled.

THE WITNESS: They said the package had been damaged in—I don't know—forklift or something on the belt, and normal company policy is to open it up to check for insurance problems or damage to the contents, and this is what they found.

BY MR. PETERSON:

Q Did they say what the extent of the damage was prior to their physically opening the package?

A I think they said the bottom of the box was crushed.

Q They didn't indicate that the box was opened in any fashion; is that correct?

A Yes. Apparently it had been the fork of a forklift that got the bottom of it.

Q And crushed it or opened it?

A Opened it somehow. That was the impression I got.

Q Am I gathering that you didn't particularly investigate any further as to how badly it was damaged when they first observed that it was damaged?

A No, we just had to repair the damage for the controlled delivery.

Q Did they tell you at what time they noticed the damaged package?

MR. LEE: I'd object to the relevance.

[34] THE COURT: Overruled.

THE WITNESS: Time?

MR. PETERSON: Time.

THE WITNESS: That morning.

BY MR. PETERSON:

Q And you testified I believe that they called you at your home at approximately was it 10 or 10:15 that morning; is that what you said?

A Nine.

Q Pardon?

A Nine.

Q And when they called you, I take it they had not yet opened the package; is that correct?

MR. LEE: I'd object to the question. It calls for speculation. Leading.

THE COURT: He can answer if he knows.

THE WITNESS: No, I was told they had opened it and found something of interest to us and called.

BY MR. PETERSON:

Q So it's your testimony that the package was not opened by them at your direction; is that correct?

A No, that's correct.

MR. GRAY: Pardon me. I didn't hear.

THE WITNESS: That's correct.

BY MR. PETERSON:

[35] Q Now, going back to your examination of the package, after you had removed the duck tape container within which the cocaine was packaged, what further examination did you conduct of the package at that time?

MR. LEE: I'd object to the question as a misstatement of the evidence, assuming and stating that the agents testified he removed the duck tape. I do not believe he so testified.

MR. PETERSON: I'll re-phrase it.

BY MR. PETERSON:

Q Agent Lewis, you testified that you removed the duck tape container from the package itself, did you not?

A I picked it up and looked at it, that's correct.

Q Okay. After you had done that, did you conduct any further examination of the container?

A At that time I did not.

Q At some later time did you?

A Yeah, at a later time we took a sample of the cocaine out and repackaged it.

Q Okay. This would be a sample in addition to the sample which Agent Kramer used for his field test; is that correct?

A That's correct.

Q When was the sample that you just mentioned removed?

A When I returned to my office with the package.

[36] Q The DEA airport office?

A That's correct.

Q And after that sample was removed, you put the package back together, so to speak; is that correct?

A That's correct.

Q And then subsequent to that, the controlled delivery was made?

A That's correct.

Q By the way, when was the first picture taken which would reflect the condition of the package on the day in question?

A After we returned to the office, our office.

Q The airport office?

A Yes.

Q And would that picture reflect the condition of the package before or after you repackaged it for the controlled delivery?

A Before.

Q Before?

A Yeah.

Q Okay. So that picture then with the exception of removing some of the cocaine and having taken the package apart and having put it back together would basically reflect the condition of the package at the time that you first observed it at the Federal Express Office?

[37] A I can't say about that. It's been awhile since I've seen that photo.

THE COURT: Gentlemen, may I interrupt? Is this gentleman who came in a witness who should be sequestered (indicating)?

MR. GRAY: No, your honor, he won't be a witness.

THE COURT: All right.

BY MR. PETERSON:

Q Now, just so the record is clear as to the various wrappings on the package, it's my understanding that the entire package itself was wrapped in the brown sort of wrapping paper; is that correct?

A Yeah.

MR. LEE: I'd ask for specificity as to what time we're talking about.

MR. PETERSON: Any time. I'm just talking about the various layers.

THE COURT: If you can answer.

THE WITNESS: The brown wrapping paper originally on the package was damaged by whatever happened at Federal Express, a belt or forklift or whatever. It was irreplaceable.

MR. PETERSON: I'm sorry.

THE WITNESS: It was irreplaceable.

[38] MR. PETERSON: Okay.

THE WITNESS: So we rewrapped it. The brown wrapping paper covered a cardboard box. The cardboard box was newspaper, duck tape and the dope.

MR. PETERSON: All right.

BY MR. PETERSON:

Q Did you retain the original brown wrapping paper that was on the package?

A Yes.

Q Okay. And that brown wrapping paper in addition had packing tape to secure the ends of the wrapping paper; is that correct?

A It was somehow affixed. I don't remember the particular type of tape.

Q Okay. Underneath the wrapping paper was the cardboard box?

A That's correct.

Q And underneath the cardboard box was duck tape which surrounded the newspaper; is that correct?

A No.

Q Okay. This was just newspaper and then there was the duck tape container; is that correct?

A Yes.

Q Then within the duck tape container were four baggies, ziplock baggies, the innermost of which contained the [39] cocaine?

A That's correct.

Q By the way, when you conducted the examinations of the package that you conducted at the airport, you didn't have a search warrant at that time; correct?

A No.

Q The only search warrant that you obtained for this package was the one where Agent Hait was the affiant, and it was to be executed subsequent to the controlled delivery; is that correct?

A Yes, it was a search warrant for the residence.

MR. PETERSON: I have nothing further.

THE COURT: How does Agent Kramer spell his name?

THE WITNESS: K-r-a-m-e-r.

THE COURT: Mr. Lee?

MR. LEE: Your Honor, I would have just a couple of questions.

REDIRECT EXAMINATION

BY MR. LEE:

Q Agent Lewis, I believe you've indicated that you signed a receipt at the Federal Express Office?

A That's correct.

Q And do you remember basically what that was a receipt for?

[40] A The package.

Q And who had asked you to sign a receipt?

A The manager along with the operations manager.

Q Did you ask for the package and its contents while you were at Federal Express?

(Pause.)

A Yes. I said we were going to take it.
MR. GRAY: Pardon me. I didn't hear you.
THE WITNESS: I think we said yes, we wanted it.

BY MR. LEE:

Q What if any statements had been made to you by the manager concerning the package prior to that time?
A It had been damaged, and it was pulled off the conveyor belt by some employee before it even got to the route truck, and that it was pulled off to inspect for damage to the contents; company policy.
Q Was any statement made concerning the observations of Federal Express of the contents of the package?
A Yes, they said they had found the white powder in there and figured it was drugs, and they called us.
MR. LEE: Thank you. I have no further questions.
MR. GRAY: I have a couple, your honor.
THE COURT: All right.

RE-CROSS-EXAMINATION

BY MR. GRAY:

[41] Q Agent Lewis, as I understand it then, Agent Kramer was the first Drug Enforcement Administration Officer that was at the scene of Federal Express at the airport; is that right?
A Yes.
Q And was he the first one, to your knoweldge, that observed this package in the state it was in at the time the Federal Express turned it over to you?
A Yes.
Q Is Agent Kramer present today in the building here someplace?
A No.
Q Where is he?
A At a doctor's office.
Q He's unavailable to testify then; is that it?
A Yes he is.

Q Was there anything said, Agent Lewis, about a locker that the package was locked in to you?

A Not to me.

Q Do you recall Agent Kramer saying anything to you about where he obtained this package from?

A No.

Q As far as you know, then the package was on the desk when Agent Kramer arrived at the scene of Federal Express; is that it?

[42] A That's correct, with the manager and the operations manager sitting at the desk.

Q Okay. And based on your discussion with Agent Kramer, that's what you believe, is that right, that he didn't go obtain it from another place? It was on the desk when Kramer arrived?

A I don't know. We really didn't get into it.

Q Okay. So you don't know where he got it from; is that right?

A He got it from—

Q Wait. Do you know where he got it from?

A He told me he got it from the two gentlemen seated there in the office.

Q You don't know what condition it was in when he got it either, do you?

A I know it was open.

Q By "open", do you mean it was damaged at the bottom or it was opened and the cocaine or the white powdery substance was displayed in plain sight of Agent Kramer; which one, do you know?

A Well, let's go back to 9 o'clock that morning. I was already told there were drugs in the package when I received the phone call. I then called Agent Kramer at home and asked him to drive by Mr. Jacobson's residence and meet me at Federal Express.

[43] Q And Mr. Kramer arrived there ahead of you?

A That's correct.

Q And again you don't know what condition that package was in except that it was open at the time Agent Kramer arrived; isn't that right?

MR. LEE: Object to the question as having been previously asked and answered.

THE COURT: The reporter will read the last question, please.

(The pending question was read by the reporter.)

THE COURT: Sustained.

BY MR. GRAY:

Q Did you weigh this package at any time, Agent Lewis?

A Yes, after we took it to our office, Agent Tomseck and myself weighed the one plastic bag and the drugs on a scale.

Q Was this prior to the search warrant being issued for the residence?

A Yes, it was.

Q What did it weigh?

A Six and a half ounces.

Q Do you know where Agent Hait and the search warrant got four ounces?

A Yes, I do.

[44] MR. LEE: I'd object to the relevancy.

THE COURT: I'll overrule it. He's already answered.

BY MR. GRAY:

Q How did it happen that he put four ounces in the warrant, Agent Lewis?

A Because I estimated four ounces before I weighed it on the phone.

THE COURT: You say it was what on the scale?

THE WITNESS: 6.5.

BY MR. GRAY:

Q Well, was the search warrant made out prior to your weighing it?

A I advised Agent Hait of what had happened that morning, and I advised him prior to going downstairs and weighing the contents.

(Pause.)

(Defendant's Exhibit 1 marked for identification.)

BY MR. GRAY:

Q Agent Lewis, showing you what has been marked defendant's Exhibit 1, can you described that or can you identify that?

A It's a Federal Express airway bill.

Q Is that the same document that you used in having it [45] over your billfold with the badge on it?

A It's approximately the same size, although I don't believe this is the same form.

Q Well, I'm getting at size more than the form.

A Yes.

Q It's the same size?

A That's correct.

MR. LEE: I believe the question has been already asked and answered, and he said, "Approximately the same size."

THE COURT: Sustained.

MR. GRAY: All right. Your honor, we'll offer this into evidence as being the same size document that was over the badge.

MR. LEE: Your honor, there's no foundation for it being accepted in evidence as being the same size. The witness, who is the only foundation evidence available, has testified it's approximately.

THE COURT: Well, it's not offered to—as the exact way bill.

I'll receive it for being one of approximately the same size.

MR. GRAY: Okay.

BY MR. GRAY:

Q Now, Agent Lewis, would you take your badge and billfold [46] out again please. All right. And, as I understand it, you had it like that (indicating); is that it?

A That's correct.

Q You had your left hand on the back of the defendant's Exhibit 1, the air freight bill, and your right hand underneath with your badge; is that right?

A That's correct.

Q And after talking about the signature being wrong, how did you do it? You pulled back (indicating). I see. And at the same time you were moving in towards the door; is that right?

I see.

THE COURT: The records should reflect that the agent removed the way bill from his credential packet and extended the packet forward.

MR. GRAY: I have no further questions.

MR. PETERSON: Your honor, are we permitted to, through this witness, go into whatever arrangement there exists between the DEA and Federal Express relative to suspected contraband packages?

THE COURT: You can ask him if he's aware of any.

RE-CROSS-EXAMINATION

BY MR. PETERSON:

Q Agent Lewis, you testified that you first learned on the morning of May 1st at 9 a.m. that there were drugs [47] in the package that we're talking about?

A Yes.

Q And you learned that as a result of a phone call between yourself and Edgar Davis; is that correct?

A That's correct.

Q Are you aware of what relationship if any exists between Federal Express and the DEA relative to packages containing suspected contraband?

A Nationwide? Or what are you talking about; local?

Q Anything you know about I guess.

A We had stopped by their office twice before, as we have all carriers and air freight forwarders at the airport, as well as ticket agents, ticket supervisors and station manager, and told them that, "If in the normal course of your business you run across something strange, please give us a call."

Q Okay. When you say "we", you mean yourself or other agents of the DEA Minneapolis district office?

A No, airport and narcotic unit.

Q Of whom?

A The state and the DEA.

Q And how long ago was this done?

A About the first week of April.

Q Of this year?

A Yes.

[48] Q Is there anything contained within either the DEA files downstairs or the DEA/BCA airport narcotics unit which reflects in writing the nature of the relationship between the air carriers and so forth and the narcotic law enforcement officials?

MR. LEE: I'd object to the question in the nature of discovery.

THE COURT: I'll allow it. You may answer.

THE WITNESS: Other than Federal law, no, I don't know.

BY MR. PETERSON:

Q In other words, has the DEA or the BCA or anybody generated a memorandum, a letter, a contract, an agreement, an understanding, any sort of document which would either have been sent to Federal Express or other air carriers and so forth such as you mentioned or would have been received by the DEA/BCA, other law enforcement officials, relative to the arrangement that you described as having been in effect since April 1st of this year?

A No, there's no contract or anything like that, no.

Q Okay. Now, when you told Federal Express and other air travel agencies to notify you whenever they see something that is suspicious or that you might be interested in or whatever language we want to use, did you give them [49] any instructions as to what they should do with packages, for instance?

MR. LEE: I'd object to the form of the question in stating that the agent told them to do something. I do not believe it reflects prior testimony.

THE COURT: Sustained.

BY MR. PETERSON:

Q What was your prior testimony, Agent Lewis?

THE COURT: The court will rely on its own memory of what his prior testimony was. Let's move on.

MR. PETERSON: Your honor, I can't ask the question if the objection is sustained.

THE COURT: That's exactly right. Let's move on.

BY MR. PETERSON:

Q Agent Lewis, when you spoke to Federal Express or other air traffic agencies relative to suspicious packages, conduct or whatever, were they given any instructions in relation to dealing with suspect packages when they observed one?

A None other than in the normal course of their business, if they ran across something strange or something that is out of the ordinary, give us a call.

Q They were not instructed or requested what to do with suspect packages and so forth other than to notify you?

A That's correct?

[50] Q And they were not instructed not to do anything further with them until you were notified?

A The only thing we instructed about that was that if they had occasion to open one or if something burst open not to touch whatever's inside because it can be dangerous.

Q Were they instructed to open or not to open any packages that they observed?

MR. LEE: I'd object to the question as being awfully broad as to it would apply to any package.

THE COURT: Agent Lewis, have you yourself or to your knowledge has any other federal agent ever asked Federal Express Offices to open packages to look for narcotics or any other contraband?

THE WITNESS: No.

THE COURT: Move on, Mr. Peterson.

MR. PETERSON: Nothing further.

THE COURT: Any other questions of this witness?

MR. LEE: I have nothing further.

THE COURT: All right. You're excused, Agent Lewis. Do you want to notify the next witness? Does the government have any other witnesses?

MR. LEE: Your honor, the government would rest at this time.

MR. PETERSON: Your honor, could we have about a two minute recess?

[51] THE COURT: All right.

(A recess was taken.)

MR. LEE: Your honor, at this time I would offer what's been marked for identification as Government's Exhibit No. 1. I believe it to be a true copy of a search warrant with attached affidavit marked Government Exhibit No. 1.

THE COURT: All right. Government Exhibit 1 will be received.

(Government Exhibit 1 received in evidence.)

MR. LEE: Your honor, for the record, I would ask the court's permission to allow Agent Lewis to remain in the courtroom. He has I believe finished testifying.

THE COURT: All right. He may remain.

MR. GRAY: Your honor, the defendant Brad Jacobson will call Daniel Stegemoller to the stand.

(The witness was sworn.)

DANIEL STEGEMOLLER

was called as a witness on behalf of the defendant Brad Jacobson, being first duly sworn, was examined and testified as follows:

THE COURT: Would you spell your last name, please?

THE WITNESS: S-t-e-g-e-m-o-l-l-e-r.

[52] DIRECT EXAMINATION

BY MR. GRAY:

Q Mr. Stegemoller, are you presently employed?
A Yes, I am.
Q And where is that at?
A Federal Express.
Q How long have you been so employed?
A 6 years September.
Q And have you been employed 6 years in the Minneapolis office?
A No.
Q How long have you been employed in the Minneapolis office?
A It will be about 14 months.
Q And what's your title there?
A City manager.
Q What did you say? City manager? Is that what you said?
A Yes.
Q As city manager, do you have your own office?
A Yes, I do.
Q And where is that located?
A At the airport.
Q And are you the only one in this office, your own office?
A Yes.
Q And I take it that has a desk and a chair?
[53] A Exactly.

Q It's where you do your paperwork; is that correct?

A Unfortunately.

Q Now, directing your attention to May 2nd, I believe—first, May 1st, 1981, what time did you go to work that morning?

A Sometime between 7 and 7:30 I believe.

Q In the morning?

A Yes.

Q And when was the first time your attention was brought to this package which is an issue here?

Let's call in the "Brad Jacobson package," for lack of a better term.

A Between 7:30 and 8:30.

Q And who was the individual that brought your attention to that package?

A One of my supervisors.

Q This supervisor, is he under you, though; is that right?

A Yes, he is.

Q Did he bring the package to your office?

A No, at the time he brought it to my attention it was in his office.

Q Does he have an office similar to yours?

A Yes.

Q And where was the package when you first saw it in his [54] office?

A On his desk.

Q Was it open at that time?

A It was damaged?

Q As a result of the damage, could you tell what was in the package?

A No sir.

Q Did you then proceed to open it?

MR. LEE: Your honor, I'd object to this line of inquiry.

I believe it can only be offered to impeach the statements in the warrant, and I believe that again counsel

have a threshold burden, and I do not believe that they have sustained that.

THE COURT: Overruled.

MR. GRAY: Would you read the question back, please?

(The pending question was read by the reporter.)

THE WITNESS: No, I do not.

BY MR. GRAY:

Q Did your supervisor proceed to open it?

A Yes.

Q At your direction?

A Yes.

[55] Q Immediately upon you observing the package?

A Yes.

Q Did you make a phone call to this Edgar Davis prior to doing that?

A No.

Q After you opened the package—strike the question. Could you describe the package, how was it packaged?

A Okay. It was in a brown—the outer wrapping was a brown paper and a cardboard box. The inner part of it was newspaper, and there was about a 10 inch tube that was wrapped in gray tape.

Q And why don't you tell the court how the supervisor opened the package and what you observed.

A You mean what manner he opened the package?

Q Yes, and what you observed. Did he open the package completely?

A Yes, he did.

Q And did you observe anything in that package?

A I observed what was wrapped in a plastic bag, a white powdery substance.

Q All right. Did you conduct any tests on it yourself?

A No sir.

Q And after you observed this, did you then call Edgar Davis?

A Yes, I did.

[56] Q And Edgar Davis is the head of security in Chicago?

A He's the manager of security.

Q All right. Now, what did you do with the package after you made that phone call?

A I took it to my office and locked it in my file cabinet.

Q All right. When you took it to your office and locked it in your file cabinet, did you close it up? Did you put it back in the condition it was when you first observed it?

A No.

Q What did you do, just leave it all open?

A I believe I slid the plastic—rolled it back up and slid it back into the gray tape and just dropped it in the box and put it in the file cabinet.

Q Okay. Did you leave the newspaper out of it then?

A No, I put the newspaper back into the box then.

Q Well, the newspaper stayed in the box? I see. So did you put the top back on the box then?

A No.

Q Subsequent to that when you took the box out of the locker, you could not see without entering the box again the white substance; is that correct?

MR. LEE: I'd object to the form of the question. Leading. Suggestive.

[57] THE COURT: Mr. Reporter, would you read the question back, please?

(The pending question was read by the reporter.)

THE COURT: Well, I think his prior answers pretty much speak for themselves. He may answer. I believe the witness testified you put the plastic back with the powder back in the tape tube?

THE WITNESS: Yes.

THE COURT: Go ahead and answer. I think it's getting a little repetitious, though.

THE WITNESS: I'm sorry. Yes, I did, and no, you could not see it. I'm sorry.

BY MR. GRAY:

Q And I take it then that an Agent Kramer came to your office; is that correct?

A No.

Q It was another agent?

THE COURT: He is your witness and there has been a lot of leading. I think that you can proceed without leading the witness. I don't think there's any showing that he's been hostile.

BY MR. GRAY:

Q After you put the box in your locker, did a person who identified himself as a DEA agent arrive at your office?

[58] A Yes sir.

Q And do you remember that man's name?

A No.

Q Would "Kramer" refresh your memory?

A It could be. I'm sorry.

Q After he arrived at your office, what happened? What did you do and what did he do?

A I turned the package over to him. I had a receipt that I typed up myself that I was turning it over to the DEA, and he signed for the package.

Q Did he then go into the package himself in your presence?

A Yes, he did.

Q And in order to see the white substance, he had to go into the package and take it apart again; isn't that right?

MR. LEE: Again I would renew the objection as to the form of the question.

THE COURT: Sustained on leading.

BY MR. GRAY:

Q What did the agent have to do to observe the white powdery substance?

THE COURT: There's no showing he observed any white substance yet.

MR. GRAY: Okay. You're right, your honor.

BY MR. GRAY:

[59] Q At any time in your presence did the agent observe the white substance, the white powdery substance?

A Yes, he did.

Q All right. And this was after you turned over the package to him?

A Yes.

Q And what did he do to observe that, if you remember?

A I don't understand the question.

Q Well, how did he observe this white powdery substance?

A He looked at it.

Q All right. How did he happen to look at it?

What did he do?

A Took it out of the box I suppose.

Q All right. And this was after the receipt was signed, too; is that right?

A I can't remember exactly whether the receipt was signed first or afterwards. It's all part of our policy to have a receipt signed.

Q Did you make out a report in connection with this matter?

A Yes, I did.

Q And did you refresh your memory with respect to this matter by reading that report prior to testifying today?

MR. LEE: I'd object to the relevance. For the purposes of this hearing I do not believe such a report [60] would be disclosable.

MR. GRAY: It's my witness, your honor. I guess I can ask the witness.

BY MR. GRAY:

Q Do you have a report with you?
A No, I do not.
Q Is it here with Mr. Davis?
A I believe he has a copy.
Q Could you go out and get it?
A I don't know if he has the incident report with him.

MR. GRAY: It's not a government report, your honor. I think I could have it with my witness.

THE COURT: I believe he has called the witness. If the witness has made a report, you have a right to look at it.

MR. GRAY: Would you run out and see?

THE WITNESS: Okay.

(Pause.)

THE WITNESS: I don't know where he's at.

(A discussion was held off the record.)

MR. GRAY: Well, your honor, that's all the questions I have at this time. If there is a report, I might recall him after reading it since the man is not around.

[61] THE COURT: I don't recall, but did you say that you had read your report prior to testifying?

THE WITNESS: Yes, I had.

THE COURT: All right. Mr. Peterson, did you have any questions of the witness?

MR. PETERSON: No questions.

THE COURT: All right, Mr. Lee?

MR. LEE: Yes, a couple questions.

THE COURT: All right. Would you take the stand again, please (indicating).

THE WITNESS: Okay.

CROSS-EXAMINATION

BY MR. LEE:

Q Does the Federal Investigation Office in Minneapolis have a policy as to what if anything will be done when damaged packages are encountered in your handling of freight?

A Yes, sir, there is.

Q And could you describe the policy?

A The policy states that a package will be opened when it is damaged or when it is suspected to be damaged.

Q And does the Federal Express Office here at Minneapolis have a policy as to what is to be done if in inspecting a package it is suspected that it contains a drug substance?

[62] A Yes sir.

Q And what is that policy?

A The policy states that—I don't know the exact wording of the policy—but it states that if there is contents in the package that may be dangerous to our employees or of an illegal substance, that I am to contact my security department.

Q Calling your attention to May 1, 1981, did you have occasion to contact your security office?

A Yes, I did.

Q And what occasioned that contact? Why did you contact them?

A I had observed what I suspected as being an illegal substance.

Q Had you had any contact that day with the Drug Enforcement Agents or with any other police personnel prior to the time that you called your company security office?

A No, sir.

Q Did you make any contact with any police or DEA agents yourself on the morning of May 1, 1981?

A No, sir. "Contact" meaning telephone calls?

Q Telephone calls.

A No, sir.

MR. LEE: I would have no further questions of the witness at this time.

[63] THE COURT: Anything further?

MR. GRAY: No, your honor, except for the fact if he gets his report I'd like to review it.

THE COURT: All right. You can take a seat back there (indicating).

THE WITNESS: Thank you.

• • • •

[2] MR. PETERSON: The defense calls Edgar Davis, your honor.

(The witness was sworn.)

THE COURT: Is Mr. Davis being called by you, Mr. Peterson?

MR. PETERSON: On behalf of both defendants, your honor.

[3] EDGAR J. DAVIS

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. PETERSON:

Q Would you state your full name for the record, please?

A Edgar J. Davis.

Q Mr. Davis, by whom are you employed?

A Federal Express.

Q And how long have you been employed by Federal Express?

A Almost 2 years.

Q And in what capacity does Federal Express employ you?

A At the present time I'm the central region security manager.

Q And what is the nature of your responsibilities in that capacity?

A It varies. We're responsible for seeing that our stations adhere to corporate policies as relates to security of our packages.

Q You're testifying here pursuant to a subpoena duces tecum; is that correct?

A Yes.

Q Did you bring with you the records that I requested in that subpoena?

[4] A The gentleman over there has one (indicating).

Q Do you have the rest of the records that I requested?

A That's all we had. There's one other thing and you might want to look at that.

MR. STEGEMOLLER: Are you talking about the policy?

THE WITNESS: Yeah.

BY MR. PETERSON:

Q Mr. Davis, provided to me has been a Federal Express incident information report and a Federal Express field operations policy and procedure manual, page 14 or 22 pages of that manual apparently. Are those the documents that you brought with you today?

A That's what I brought.

Q Now, do you have a copy of my subpoena with you?

A Yeah.

(Pause.)

MR. PETERSON: Your honor, was the original subpoena filed with the court?

THE COURT: It wasn't filed with me. It may be in the clerk's office.

(Pause.)

(Defendant's Exhibit 2 marked for identification.)

BY MR. PETERSON:

[5] Q Mr. Davis, showing you a document which has been marked for identification as Defendant's Exhibit 2, would you examine it and tell me if that is a copy of the subpoena which was served upon you.

A Yes, it is.

MR. PETERSON: Offer Defendant's 2, your honor.

THE COURT: Mr. Lee?

MR. LEE: I'd object to it at this point. I believe there's lacking a showing of relevance. I believe the witness has produced certain documents, and at this point I don't see any need for the subpoena.

THE COURT: Well, I certainly see no need for it.

MR. PETERSON: The purpose, your honor, is to inquire as to whether he has produced all of the documents within the scope of the subpoena.

THE COURT: All right. It will be received for that purpose.

MR. PETERSON: Thank you.

(Defendant's Exhibit 2 received in evidence.)

BY MR. PETERSON:

Q Mr. Davis, have you produced all of the documents [6] which are enumerated or indicated by that subpoena?

(Pause.)

THE COURT: Is there a question?

MR. PETERSON: Yes, unless he answered it.

MR. LEE: Your honor, I would object. I don't believe there was a question. It seemed more of an observation I believe.

MR. PETERSON: I asked if Mr. Davis had produced all of the documents which are either enumerated in or indicated by the subpoena.

BY MR. PETERSON:

Q Have you given them to me?

A Yes, you have them there.

Q These are all the documents that would be within the scope of that subpoena?

A That's right. That's all we had.

Q "All we had" meaning Federal Express?

A Meaning the security department.

Q Are you indicating that Federal Express may have other documents which would come within the scope of that subpoena?

A No.

(Pause.)

THE COURT: Let's have the next question.

BY MR. PETERSON:

[7] Q Mr. Davis, relative to your involvement with this case, when did you first become involved?

A I was called. I don't recall the date.

Q May 1st?

A By Dan and—

Q Mr. Stegemoller?

A Mr. Stegemoller. He informed me that they had a package that had been damaged, and they had opened it to inspect the contents, which our policy calls for, and that they had found a substance that was suspicious, and I informed him to immediately contact the local Federal agency.

Q Did you give him any other instructions?

A No.

Q Did you do anything else at that point?

A Other than make a note on my note pad in my office, no.

Q Did you have any contact with any law enforcement officials at that time?

A No.

Q Did you have anything else to do with this case with the exception of looking for documents when you were subpoenaed?

A That's all.

MR. PETERSON: I have nothing further.

[8] DIRECT EXAMINATION

BY MR. GRAY:

Q Mr. Davis; is that correct?

A That's correct.

Q Is it your testimony that you did not call the Drug Enforcement Administration in connection with this matter, that Dan Stegemoller did?

A That's correct.

Q Do you have a recollection or will it show in one of these documents at what time in the morning Mr. Stegemoller called you? Would it say?

A No.

Q You said that you put a notation down on your desk with respect to this incident. Did that state the time that you called?

A No, I don't believe there's a time on there.

Q Okay. What time do you go to work in the morning?

A I'm usually there by 7.

Q All right. And that's Chicago?

A That's central standard time.

Q All right. Now, do you recall how long after you were there that morning that you were called by Mr. Stegemoller?

A No. It had to be in the morning because the district director came in that afternoon, and I mentioned it to [9] him that they had a package.

Q Showing you this report that you provided to Mr. Peterson as a result of a subpoena, was that report made out by an Ed Childers, do you know?

A Could have been.

Q It wasn't made out by you?

A No.

Q Okay.

MR. GRAY: I have no further questions.

MR. LEE: Your honor, for the record, I would suggest that the documents supplied by this witness to Mr.

Peterson be offered. I believe we do have the subpoena in evidence.

MR. PETERSON: Yes, I neglected to do that, your honor. Perhaps if we could have copies made and I would offer the copies.

THE COURT: I think that would be best. Well, I wonder, we could probably have the originals marked and then when the hearing is over make copies and give him his originals back.

(Defendants Exhibits 3 and 4 marked for identification.)

FURTHER DIRECT EXAMINATION

BY MR. PETERSON:

Q Mr. Davis, showing you what have been marked as [10] Defendant's Exhibits 3 and 4, would you examine them and identify them for the record, please?

A Exhibit 3 is a copy of Section 3 of our policy and procedural manual which governs the opening of packages. The Exhibit 4 is a copy of the incident reports which are sent to my office per my instructions from any station, and in this case the Minneapolis station.

Q And in addition attached to Exhibit 4 is a receipt signed by Agent Lewis apparently?

A Yes.

Q And in addition to that Exhibit 4 also has a card of Agent Lewis attached to it; is that correct?

A That's correct.

Q Do you know when the card was attached to that exhibit?

A No, I don't.

Q Okay.

MR. PETERSON: Your honor, I would offer Defendant's Exhibits 3 and 4 and agree that copies of the originals may be substituted for the court's file.

MR. LEE: No objection.

THE COURT: All right. Defense Exhibits No. 3 and 4 may be received and copies may be substituted at the conclusion of the hearing.

[11] (Defendant's Exhibits 3 and 4 received in evidence.)

CROSS EXAMINATION

BY MR. LEE:

Q Mr. Davis, are you familiar with the policy if any that Federal Express has when damaged packages are found to contain suspected contraband?

A There's no—when it's suspected of having contraband, our managers are instructed to call either the regional security manager, and if he's not—if he can't be located, they're to call Memphis, and they will receive their instructions as to what to do with that substance at that time. The reason I say "receive instructions" is because some of our stations are not located on airport property. Therefore, we'd have to determine what jurisdiction they're in and in turn instruct them to contact that particular authority.

Q Do you recall on or about May 1st, 1981, speaking to any Drug Enforcemnt Agent either personally or by phone regarding this incident?

A At the time that that occurred, no.

Q You didn't make a report of your activities on that day in any detail; is that correct?

A No.

[12] Q Could it have been possible that you would have spoken to one or more agents on or about that date?

MR. PETERSON: Object to that as speculative.

THE COURT: You may answer.

THE WITNESS: I'll put it like this: If the contents as described to me over the phone would have warranted me talking to them, I would have.

BY MR. LEE:

Q That's standard practice or policy to contact the

drug agents when the suspected contents is a drug substance?

A That's right.

Q Do you generally adhere to that policy when you receive such a call?

A We do.

Q And what is the practice, if you can be more specific, when a manager notifies you that he suspects he has drug substances on his hands?

A Since we don't have the authority to dispose of illicit material, we contact either—if it's on an airport facility, we contact the local DEA. If it's on a—one of our stations located within a town or city or within a county, we contact the local narcotics people.

[13] Q Now, when you say "we" do you then mean your office of security?

A No, no. To cut down on the number of people involved, I merely instruct the station manager to call the local—either the federal agency or the local county or local police to take care of that.

Q Prior to coming to court here today and subsequent to early May 1, 1981, had you had occasion to speak with any drug agents about this investigation?

A No.

Q By phone?

A No.

Q Okay.

MR. LEE: I would have no further questions of the witness at this time.

REDIRECT EXAMINATION

BY MR. PETERSON:

Q Mr. Davis, if you had spoken to either a DEA agent or some other law enforcement agent relative to this matter on May 1st, 1981, as part of your policy and practice, you likely would have made a report to that effect, would you not?

A If it was just a casual conversation over an issue that they were concerned about, I wouldn't have. If it was something that had to do with a package out of [14] a station, yes, I would have.

Q In other words, if you learned that a package containing suspected contraband had been located either at an airport or at a station, and you had contacted the DEA relative to that package, likewise you would have prepared a report about it; correct?

MR. LEE: I'd object to the question as leading, argumentative. I believe he's in substance answered the question previously.

THE COURT: I'll allow the question.

(Pause.)

THE WITNESS: Would you rephrase that or ask that again, please?

MR. PETERSON: I think I'll just withdraw the question. I have nothing further.

MR. GRAY: I have nothing further of this witness. I do have a couple of questions of Mr. Stegemoller.

THE COURT: All right. You're excused. Thank you.

THE WITNESS: Thank you.

(The witness was excused.)

MR. GRAY: Your honor, after reviewing the reports, may I recall Mr. Stegemoller for a couple of questions?

[15] THE COURT: All right.

(The witness was previously sworn.)

DANIEL STEGEMOLLER

recalled as a witness by defendant Brad Jacobson, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GRAY:

Q Showing you what has been marked as Defendant's Exhibit 4, Mr. Stegemoller, do you recognize the hand printing or writing on that document?

A Yes, I do.

Q And whose is that?

A That's my supervisor.

Q That's your supervisor, Ed Childers?

A Yes, it is.

Q And directing your attention to the bottom of that document, it states as follows: "Call DEA and corporate security; package tendered to DEA at 10:35 to Special Agent Lewis"; do you see that?

A Yes, I do.

Q And does that mean that Ed Childers called the DEA?

MR. LEE: I'd object. Lack of foundation for this witness to know.

THE COURT: Well, I'm going to allow the [16] question because apparently there's some confusion on who did call the DEA, and I'd just as soon find out who it was.

THE WITNESS: Okay. I did not call the DEA. It was my supervisor.

BY MR. GRAY:

Q Were you present when your supervisor called the DEA?

A Yes, sir.

Q You were?

A Yes.

Q What time did he call the DEA?

A It says on here at 10:35.

Q No, it says, "tendered to DEA at 10:35 to Special Agent Jim Lewis." If you read it correctly, you'd see

that that's the time he turned the package over. You see that?

A Right.

Q You didn't turn the package over to Mr. Kramer, you turned it over to Mr. Lewis; isn't that right?

A Yes, Mr. Kramer was with Mr. Lewis at the time.

Q Well, do you have a specific recollection as to whether or not you called the DEA, this James Lewis, before or after, and I don't mean you, I mean Ed Childers, in your presence, before or after the package was opened by you and Mr. Childers or by Mr. Childers?

[17] A It was after.

Q Do you specifically recall that?

A Yes, sir.

Q Who told you to call Mr. Lewis?

A I was not told to call Mr. Lewis. I was told to call the DEA by Edgar Davis.

Q Pardon me?

A By Edgar Davis.

Q Is there any message to you or is there any indication to you which one you called first, Edgar Davis, or the DEA when you put in the bottom of this document, "Call DEA and corporate security," it seems to me it looks like the DEA was called before corporate security.

MR. LEE: Your honor, I'd object to the question as being previously asked and answered and argumentative.

THE COURT: Sustained on the grounds it's argumentative.

BY MR. GRAY:

Q Did Ed Childers make out this report in your presence?

A Yes, he did.

Q Did you assist him with it?

A Yes, I did.

Q And at what time did you make the report out; [18] immediately after the incident?

A Before 10:35 is all I can recollect.

Q You have on the document it says, "Time of incident 8:30"; is that right?

A Yes, I do.

Q Does that mean the incident with respect to opening the package?

A Yes.

MR. GRAY: I have no further questions.

MR. PETERSON: A couple, yeah.

DIRECT EXAMINATION

BY MR. PETERSON:

Q Mr. Stegemoller, I guess I'm a little unclear. The first DEA agent you saw on May 1st was not Agent Lewis; is that correct?

A That's correct.

Q And the first agent that you saw on that day had examined the contents of the package prior to Agent Lewis' arrival; is that correct?

A I believe so.

Q And at the time that the other agent arrived at your office, the package itself had been put back together so the contents of the package were not visible; is that correct?

A They were not visible.

[19] Q And upon his arrival, you turned custody of the package over to the first agent which arrived; is that correct?

A Yes, sir.

Q And then he examined the contents of the package in your presence; is that correct?

A Yes.

MR. PETERSON: Nothing further.

THE COURT Mr. Lee?

CROSS EXAMINATION

BY MR. LEE:

Q Well, is it true that prior to the time you turned the package over to the first agent that arrived, it had not been closed or repackaged in any way?

MR. PETERSON: I object to that as a double question.

BY MR. LEE:

Q Well, after you opened the package and inspected its contents, was the package closed in total?

A No, sir.

MR. PETERSON: I object to that as lacking specificity. It's also repetitious.

BY MR. LEE:

Q After you examined the contents of the package, what, if anything, did you do with it as respects closing [20] it?

MR. PETERSON: Object to that as repetitious.

THE COURT: Overruled.

THE WITNESS: I believe the plastic bags were rolled up, slid into the gray tube, and it was placed into the container.

Q Anything else?

A No, sir.

MR. LEE: I have nothing further.

THE COURT: Anything further?

REDIRECT EXAMINATION

BY MR. PETERSON:

Q Mr. Stegemoller, did you not testify previously that in addition to that the newspaper was put back in the cardboard box?

A No. I testified that the paper had not been taken out of the box.

Q It was just a duct tape tube itself that had been removed from the box?

A Yes.

Q Okay. And you had removed the ziplock baggies from the duct tape tube?

A I don't know what kind of baggies they were, but, yes.

Q And prior to the arrival of the agents, you had rolled out the plastic baggies again, put them back in the [21] duct tape tube, put the duct tape tube back in the cardboard box; is that correct?

A I'd like to make a clarification. When I say that I put it back into the tube, I didn't necessarily mean that I sealed the tube back up. I did slide the plastic bags back into the container and placed the container in the box.

Q Okay. And what did you do with the exterior of the box?

A Nothing.

Q But there's no question about the fact that you could not see—well, let me ask it this way: If the box were sitting in front of you on the table, could you see the duct tape tube?

MR. LEE: I'd object to the question as to relevance.

THE COURT: Overruled, but I believe he's already answered it. You may answer it again.

THE WITNESS: Yeah, I believe you could see the box had not been closed back up. It had just been laid back into the box.

BY MR. PETERSON:

Q. But you could not see the baggies within the duct tape tube; is that correct?

MR. LEE: Object to the form of the question. [22] Leading and suggestive.

THE COURT: It is, but maybe it will be the last one. You may answer.

THE WITNESS: I believe you could.

MR. PETERSON: Nothing further.

MR. LEE: I have nothing further.

THE COURT: All right. You may be excused. Thank you.

(The witness was excused.)

[17] TRIAL TESTIMONY OF JAMES L. LEWIS
DIRECT EXAMINATION

* * * *

Q And you are a federal law enforcement officer?

A That's correct.

Q Going to May 1st of 1981 specifically, did you have any contact with a business named Federal Express on that date?

A Yes.

Q At what time was your first contact with them?

A At approximately 9:00 in the morning I believe received a message at home via a pager to call a gentleman with Federal Express by the name of Edgar Davis in Chicago, Illinois.

Q Did you call Mr. Davis in response then?

A Yes, I did.

Q Once you had called Mr. Davis, without saying what he told you, did you contact any other Drug Enforcement agents in the Twin Cities area here?

A Yes, I did.

Q Who did you conact?

A Jerry Kramer.

[18] Q And did you give him any instructions?

A Yes, I advised him of what I had learned from Mr. Davis.

Q Did you ask him what to do in response to what you had learned?

A Yes.

Q What did you tell him to do?

A I asked him to drive by an address in Apple Valley, Minnesota, being 7300 West 130th Street.

Q About what time was it that you telephoned Agent Kramer?

A Approximately 10 after 9:00, 9:15 in the morning.

Q Did you yourself then go anywhere in response to this situation?

A Yes, I did.

Q Where did you go?

A I went to the Federal Express facility at the Minneapolis-St. Paul International Airport.

Q And once you got there were there some Federal Express officials there?

A Yes.

Q Who was it that you dealt with there?

A The manager, Dan Stegemoller, I believe is how it's pronounced.

Q Do you know how to spell that?

[19] A No.

Q Would it be S-t-e-g-m-o-e-l-l-e-r, or approximately that?

A Yes. The other gentleman I think was the operations manager, Ed Childers.

Q C-h-i-l-d-e-r-s?

A Yes, I believe so.

Q Did they show you anything?

A When I walked into their office, and I don't know exactly which one's office it was, there was a box setting on the desk.

Q What kind of a box?

A Cardboard covered with brown wrapping paper.

Q Was it opened at the time you first observed it?

A Yes, it was.

Q Can you describe the box in more detail, its approximate size, the description of the wrapping?

A It was about 10 by 6 by 10 with brown wrapping paper.

Q Was there any labeling on the wrapping?

A Yes, there was an airway bill affixed, as well as several, I think some type of Federal Express priority

one package stamp and some fragile stickers had been affixed to the wrapping.

Q Was it addressed to any particular person or [20] address?

A Yes.

Q Can you tell us what that person's name was and what the address was?

A The airway bill had the consignee as B. Jacobs with an address of 7300 West 130th Street, Apple Valley, Minnesota.

Q Did the box itself, from your examination of it, appear to have any damage to it?

A Yes.

Q What did it look like?

A The lower end or one end, the opposite end of the one that was opened, had been slashed or gouged, or something. It was ripped on that end.

Q Did you examine the contents of the box?

A Yes.

Q What did you see inside during your examination?

A Well, the box was open when I walked into the office. There was newspaper, wadded-up newspaper in the box along with about a 10-inch tube of duct tape, this silver tape you see in the basement on ducts to seal the duct together, tape about that wide (indicating), and it was wrapped around and around into a tube about 10 inches long, probably about, oh two and a half inches in diameter.

THE COURT: How wide was the tape, did you say? [21] THE WITNESS: The tape was I think, oh, inch and a half width normally.

The tube had been slit open on one end and sticking out of the slit was some rolled-up plastic bags and you could see white, something white contained in the plastic bags.

BY MS. SYMCHYCH:

Q Did you pull out the plastic bags and further look at what the contents were?

A Yes, I believe so at that time.

Q What did you see when you did that?

A Well, I observed that contained within the plastic bags that had been inserted in the duct tape was a white powder.

Q Was the white powder contained in a single plastic bag inside the tube?

A No, I believe there were four. The white powder being in one bag, then that bag put in another bag, then another bag, and then finally the fourth.

Q When you got to the Federal Express office was there anyone else there other than Mr. Stegemoller, Mr. Childers and yourself?

A Yes.

Q Who else was there?

A Jerry Kramer.

[22] Q Now, once you had made this examination of the box and its contents, did you then leave the package and its contents with the Federal Express people?

A No.

Q What did you do?

A I took it.

Q Where did you take it?

A I took it to our small office at the airport.

Q Did you take the box itself?

A Everything.

Q You took the original wrapping, did you?

A Yes.

Q And the newspaper inside?

A Yes.

Q The duct tape?

A Yes.

Q And the plastic bag containing the white powder?

A Yes.

Q I am going to show you now what has been marked for identification on a yellow tag with Government's Exhibit No. 2, and ask you to examine the exhibit and tell us whether you recognize it.

A This is the original box that I saw on that morning in Federal Express minus the brown paper wrapping that was on it at that time.

[23] Q Can you tell from an examination of the box, and specifically for the damage that you saw on the morning of May 1st of 1981, whether it's exactly the same box?

A Yes. This end was open when I arrived there and this end of the box right in this area had been slashed and ripped, as you can tell from the inside of the box, and we repaired this rip in the box with this tape that I put on, as well as this one strip of sticky tape on the inside.

MS. SYMCHYCH: Government offers Exhibit No. 2, Your Honor.

(Government's Exhibit 2 offered in evidence.)

MR. PETERSON: May I inquire, Your Honor?

THE COURT: Sure.

MR. PETERSON: Agent Lewis, has the appearance of the box from the first time that you saw it changed in any way other than repairing the hole, adding the tape that you added and adding the DEA evidence tag, the tag that I am holding up now, and the exhibit label?

THE WITNESS: Well, when I first observed it it had brown wrapping paper on it. So I didn't really see the outside of the box until I broke it down and took the wrapping paper off and made that repair. So it's the same except for our evidence stickers.

MR. PETERSON: There appears to be some other [24] writing on the box. That wasn't added by you or other law enforcement officials?

THE WITNESS: No. Some place on there are my initials and the date, but other than that, no.

MR. PETERSON: I have no objection.

MR. GRAY: I have no questions at this time, Your Honor. No objection.

THE COURT: There being no objection, Government's Exhibit 2 is received.

(Government's Exhibit 2 received in evidence.)

MS. SYMCHYCH: May I pass it also to the jury, Your Honor.

THE COURT: Yes.

BY MS. SYMCHYCH:

Q Agent Lewis, did you retain the original packaging which you took off Government's Exhibit No. 2?

A Yes.

Q I am going to show you what has now been marked for identification as Government's Exhibit No. 3, and ask you if you recognize the exhibit?

A Yes, this is the original wrapping from the box.

Q What is it that causes you to recognize it as the original wrapping from the box?

A Well, the various stickers on it, plus the rip over here where it was damaged, and my initials and date.

[25] Q At the time that you first observed the original wrapping did it have a designation of name and address on it?

A Yes.

Q Where was that located on the original wrapping?

A About a 5 by 8 multi-sheet airway bill that slips into this plastic see-through.

Q That's not there right now, is it?

A No, it isn't.

Q You removed it, did you?

A Yes, I did.

Q Other than that is the original packaging in the same condition as it was when you saw it on May 1st of 1981?

A Yes.

MS. SYMCHYCH: Government offers Exhibit No. 3, Your Honor.

MR. GRAY: I have no objection, Your Honor.

MR. PETERSON: No objection.

THE COURT: All right, Government's Exhibit 3 is received.

(Government's Exhibit 3 offered and received in evidence.)

• • • •

[29] Q Agent Lewis, when you got back to your office were there any other Drug Enforcement agents in your company?

A Yes, Jerry Kramer was with me and Tom Olby, a narcotics agent for the State of Minnesota.

Q Once you got back to your office did you further examine the package at all?

A Yes.

Q Did you do anything to determine the weight of the contents?

A Yes. We took the plastic bags out of the duct tape tube and weighed them.

Q Who weighed them?

A I did.

Q Where was the scale that you weighed them on?

A Agent Tomcik, who had arrived after we got to our office at the airport, accompanied me down to the airport police department where we weighed them on a postal scale.

Q What weight did the white powder substance in the four plastic bags turn out to be?

[30] MR. GRAY: Object to this as lack of foundation, Your Honor.

THE COURT: What foundation do you want?

MR. GRAY: With respect to the postal scale, if it was accurate, verified. Did they verify the accuracy of the postal scale beforehand? We are dealing with a small amount, Your Honor.

THE COURT: Want to ask some questions along that line?

BY MS. SYMCHYCH:

Q Agent Lewis, did you take any steps to test the accuracy of the postal scale upon which you weighed the substance?

A It was set on zero and—

MR. GRAY: Object to this as not responsive, Your Honor.

THE COURT: I think it's responsive. You can go ahead.

A The needle was set on zero and we pushed it down a couple of times to make sure it was operable. We did not take a one-ounce weight and test the accuracy of it.

BY MS. SYMCHYCH:

Q During your experience as a Drug Enforcement office have you had the opportunity to weigh powdery substances?

[31] A Yes.

Q On about how many occasions?

A Hundreds.

Q And have you had the opportunity to weigh powdery substances of a similar quantity to the subject which you weighed on May 1, 1981?

A Yes.

Q Have you had the opportunity additionally to weigh powdery substances that were similarly packaged?

A Yes.

Q To the one that was weighed on May 1st of 1981?

A Yes.

Q Following your weighing of the four plastic baggies and the powdery substance on May 1st of 1981, was the result consistent with results you had previously obtained in your experience in weighing similar substances?

A Yes.

Q Could you now tell us what the weight was of the powdery substance included in the four plastic baggies that you weighed on May 1st of 1981?

MR. GRAY: Same objection, Your Honor. May I ask a couple of questions along that line?

THE COURT: All right.

MR. GRAY: Agent Lewis, the search warrant in this case, was it issued after the weighing of the substance? [32] THE WITNESS: It was issued—meaning by "issued," signed by the Judge—after the weighing of the substance.

MR. GRAY: I notice in the search warrant that the amount—well, I will show it to you. The amount in the search warrant that was to be searched at this residence is different than the amount in the complaint, is that right?

THE WITNESS: That's correct.

THE COURT: Say that again, would you, please.

MR. GRAY: The amount stated in the search w[a]rrant that was issued after the substance was weighed is different than the amount that was in the complaint is-isued later, Your Honor. As a matter of fact, the amount in the search warrant is—

MS. SYMCHYCH: Objection, Your Honor. It calls for hearsay.

THE COURT: Yes, I think we can stop there.

MR. GRAY: Your Honor, I have an objection, lack of foundation, with respect to the weight of this substance.

THE COURT: I think with the foundation that was laid by counsel, that I am going to overrule the objection and that the answer may be given.

BY MS. SYMCHYCH:

Q Agent Lewis, will you please tell the jury what [33] the result was when you weighed the white powdery substance in the four plastic bags?

A Six and a half to seven ounces.

Q Now, following your weighing of that substance did you remove any of the substance from the baggies?

A Yes.

Q I'd like you, if you would, to describe to the jury in more detail what this white powder looked like; just a visual description now.

A Sugar.

Q Was it consistently granular, with little granules of all the came size?

A No.

Q Can you describe then for the jury what it looked like in terms of its granular consistency or inconsistency?

A It kind of looked like sugar that had been damp. It was, some of it, chunky.

Q When you removed a portion from the plastic bag of white powder can you describe to the jury what the portion looked like that you removed?

A It was a small amount that I poured out of the bag into an evidence bag; oh, 10, 12 grams of white powder.

MR. GRAY: I am sorry, I didn't hear that, when he said 10 or 12—

THE COURT: "Grams of white powder."

• • • •

TRIAL TESTIMONY OF JERRY KRAMER
DIRECT EXAMINATION

• • • •

[155] Q After doing that where did you go?

A I drove to the Federal Express office on 34th at the west side of the airport.

Q Where did you go at the Federal Express office?

A Into the city manager's office.

Q Do you recall his name?

A I believe it was Ed something. I'm not sure. Ed or Dan something.

Q How many people did you meet with there?

A There were two men.

Q Ed Childers and Dan Stegemoller?

A That sounds familiar. I believe those were the men.

Q Were there any other narcotics or Drug Enforcement agents there when you met with Stegemoller and Childers?

A No.

Q About what time was that?

A I probably arrived there at approximately 10:00 or shortly thereafter.

Q Did you go into a small office area there?

A Yes.

[156] Q Was there anything there that they showed you?

A Yes, a box on the table or desk.

Q Describe it as you saw it right when you walked in.

A The box was centered on the desk. The top was open and a hole punched in the side of the box.

Q Was there wrapping on the box designating a place where it was supposed to travel to?

A Yes, the outer brown paper wrapping was still around the box.

Q Did that have any damage to it?

A Well, a hole punched in the side and then the top had been opened.

Q Now you say that the top had been opened. Were you then able to view what the contents of the box were?

A As I got closer to it, yes.

Q What did you see inside the box as you examined it?

A There was wadded-up pages of newspaper.

Q Did you look further into the contents of the box?

A Yes.

Q Describe the entire contents as you examined them, what you saw.

[157] A There was a, probably five or six wadded-up pieces of newspaper as packing, and then there was a tube formed by duct, d-u-c-t, tape approximately 10 inches long and sort of the shape of a football, the entire length of that duct tape tube. Then there was

strapping tape wrapped around that and one end of the tube had been slit open.

Q Did you see what was inside the tube?

A After I pulled the plastic bags out I did.

Q Describe to the jury what you found inside the duct tape tube.

A There was clear plastic bags, a total of four of them, each one wrapped inside the other, and then the fourth bag contained the white powder.

Q Now, can you describe to the jury exactly how the bags were contained within one another and how they were either folded or wrapped?

A Yes. The one containing the white powder, the bottom portion was filled with the white powder and then had been folled and sealed at one end. Then that had been placed inside another plastic bag and that had been rolled and sealed, and so on, until the fourth bag contained the other three.

Q Now, once you observed that there was a white powder inside that innermost bag, did you conduct any type [158] of preliminary test on it?

A Yes, I brought what are known as field testers into the office with me and I used a Scott reagent field test to test for cocaine.

Q Is there some type of visible thing that happens when you use that field test?

A Yes, it's a three-step process, three tubes, and the color changes on each of the three stages if it's a positive test for cocaine.

Q It's just a screening test, is it not?

A Correct. It's a field test for agents.

Q Now you have used that on prior occasions and in other investigations, have you?

A Yes.

Q When you applied the field test to the white powder substance that was in the package, tell the jury what you saw.

A The results of the total test or each stage of it?

Q Well, if you can summarize it without getting overly elaborate about it.

A Well, the end result was positive. Pink over blue indicated presence of cocaine.

Q Was Special Agent Lewis there at the time that you field tested the material?

[159] A No.

Q Did you show him the results of the field test?

A Yes.

Q About how much later?

A I conducted the field test at approximately 10:15 and approximately 10:30 Agent Lewis and Olby arrived and I showed them the field test.

Q Now I am going to show you what have been received as Government's Exhibits 2 and 3 in this matter, and ask you if after an examination of them you can state whether or not they are the same box and packaging that you observed in the Federal Express office on May 1st of 1981?

A Yes, they are.

Q Now, is the location of the damage to the box and the packaging that you described evident on those two exhibits?

A Yes.

Q If you can, can you point out to the jury in a way that they can see where it is?

A Yes. When I first saw the box it was setting on a desk like this, and the hole had been punched in the side here.

Q Was that tape on top of the hole there then?

A No, it was added later.

[160] Q Then is there damage on the corresponding spot on the original packaging?

A Apparently on this side here.

Q On the ripped side?

A Yes.

Q Now, after field testing and getting a positive result for the presence of cocaine, did you make a decision

about what you would do with these materials that were in the Federal Express office?

A Yes.

Q What did you decide to do?

A First, Agent Lewis signed a receipt for the box and contents and gave that to Federal Express. Then we proceeded over to the airport.

Q Where did you go in the airport?

A To the airport detail office, also known as BCA office in the main terminal.

Q Once you got to the airport office did you have another opportunity to look at the white powder substance?

A Yes.

Q Do you know if any of that material was removed for sending to the DEA lab in Chicago?

A Yes, I was there when a simple was removed and placed in an evidence envelope.

[161] Q Was the sample removed directly from the substance that you had taken from Federal Express?

A Yes.

Q And was it packaged up and sealed up right in your presence?

A Yes, it was.

Q Were you present when the remaining white powder substance was weighed?

A No, not when it was weighed.

Q Did you participate in the repackaging of the plastic bag with the white substance inside, then the duct tape tube and the newspaper and the box?

A Yes.

Q Did you actually participate in that repackaging?

A Yes, I did.

Q Was it packed in substantially the same manner that you had observed it when you first got to the Federal Express office?

A Yes, even to the point of I stamped "fragile" on the seams several places on the packing.

Q Now, did you use this original wrapping Exhiibt No. 2 in repackaging?

A No, we replaced the outer wrapping. That is the original box and wrapping, and we changed the outer wrapping.

• • • •

CROSS-EXAMINATION

• • • •

[199] Q The field test that you performed, was that performed on the substance while it was still within the plastic baggie, or did you remove some to perform your field test?

A I took a knife blade and removed a small amount out of the baggie to put in the test.

Q So it would be something less than a gram that you removed?

A Oh, yes. It was a trace amount.

Q Where did you put the amount that you removed?

A In the test kit.

SUPREME COURT OF THE UNITED STATES

No. 82-1167

UNITED STATES, PETITIONER

v.

BRADLEY THOMAS JACOBSEN and
DONNA MARIE JACOBSEN

ORDER ALLOWING CERTIORARI

Filed March 7, 1983

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 406361 1358

No. 82-1167

IN THE

Supreme Court of the United States

October Term 1982

UNITED STATES OF AMERICA,
Petitioner,

vs.

BRADLEY THOMAS JACOBSEN and
DONNA MARIE JACOBSEN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MARK W. PETERSON
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, MN 55401
(612) 339-8626
Attorney for Respondents

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QUESTION PRESENTED

DID THE COURT OF APPEALS ERR IN CONCLUDING THAT NARCOTICS AGENTS VIOLATED THE FOURTH AMENDMENT BY CONDUCTING A MORE EXTENSIVE WARRANTLESS SEARCH OF A PACKAGE THAN THAT PREVIOUSLY CONDUCTED BY PRIVATE PERSONS.

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UNITED STATES OF AMERICA,

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DONNA MARIE JACOBSEN,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

STATEMENT OF THE CASE*

The Government seeks review of the decision of the United States Court of Appeals for the Eighth Circuit holding that federal agents violated the Fourth Amendment where, after a search of a package by private persons, they extended that search by removing several samples of a substance which field testing revealed to be cocaine.

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*"T." refers to the transcript of trial.
"S.H." refers to the transcript of the suppression hearing, May 26, 1981.
"Pet." refers to the Government's Petition for a Writ of Certiorari.
"App." refers to the Appendices to the Government's Petition.

1. On the morning of May 1, 1981, a "sorter" for the Federal Express office in Minneapolis, Minnesota, brought to the attention of his supervisor a damaged package. (T. 563). Pursuant to company policy the package was opened to determine possible damage to the contents. (T. 537; S.H. 53).

The package itself was approximately 6x6x10 inches in dimension. (T. 19). Brown wrapping paper and a Federal Express shipping label appeared on the outside; inside that was a cardboard box; and upon opening the package, rolled-up newspapers were found to surround a tube of gray duct tape, approximately ten inches long and two inches wide, which in turn contained four plastic baggies, the innermost of which contained a white, powdery substance. (S.H. 55; T. 20).

Federal Express employees suspected that the substance was an illegal drug; therefore they contacted the regional security manager for Federal Express, who told them to contact the local Drug Enforcement Administration office. (S.H. 55; T. 538). The plastic baggies containing the substance were replaced within the tube of duct tape, which was replaced in the box, covered by the newspapers, and the package was then locked in a file cabinet. (S.H. 56).

DEA Agent James Lewis received the first contact from Federal Express, and Agent Jerry Kramer was the first to arrive at the Federal Express office at the airport. (S.H. 16, 29). The package was turned over to Kramer, who then closely examined it and its contents, including removing a sample of the substance, which field-tested positive for cocaine. (S.H. 29, 59).

Shortly thereafter, Agent Lewis arrived at the Federal

Express office. He proceeded to examine the open package at this time, noting that it was addressed to "B. Jacobs", at Respondents' address. (T. 20; S.H. 31).

Lewis and Kramer then took the package to the DEA office at the airport, where the cocaine was removed and found to weigh approximately six and one-half ounces. (S.H. 36, T. 33). A sample of the substance was removed for further testing, and the package was then re-wrapped to appear as if it had never been opened, for the purpose of delivering it. (S.H. 35; T. 37).

Agent Lewis, dressed to look like a delivery man, then made a "controlled delivery" of the package to Mrs. Jacobsen. (T. 40-1). In the meantime, other agents obtained a search warrant to be executed at the Respondents' residence after the delivery of the package. (T. 365). Agent Lewis therefore returned approximately one hour later, claiming he had not received a proper signature for the package. When he was denied entry to the residence, forcible entry was made. (T. 49, 51-3). Execution of the warrant resulted in the discovery of residue from the package (T. 173), the original cardboard box (T. 367), a baggie containing cocaine traces (T. 77) and various paraphernalia. (T. 368-76).

2. Respondents moved to suppress the evidence obtained pursuant to warrant on the grounds that the warrant was based upon a prior, illegal search without a warrant, relying in part on *Walter v. United States*, 447 U.S. 649 (1980). Both the Magistrate (App. E, 24a-25a) and the District Court (App. D, 15a) found *Walter* distinguishable and therefore denied the motion to supress.

3. The Court of Appeals for the Eighth Circuit reversed the decision of the District Court, finding *Walter*

controlling. (App. A, 4a-6a). As in *Walter*, Respondents had a legitimate expectation of privacy in the package; private parties conducted a search of the package; but once the Government obtained lawful possession of the package, they conducted an unlimited official search which exceeded the scope of the private search. The Court of Appeals thus concluded:

> The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder. In the absence of exigent circumstances, which the government does not allege, we hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof. (App. A. 6a; fn. omitted).

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Government's first argument in support of their Petition is that the removal of several samples of powder from the package and their field testing by the narcotics agents violated no Fourth Amendment rights of the Respondents because the Respondents had no legitimate expectation of privacy in the cocaine. (Pet. at 7). Their argument is based upon a faulty premise, however, as it is established beyond peradventure that Respondents "had a reasonable expectation of privacy that the contents of the package

would remain private." (App. A, 3a). In support of this proposition, the Court of Appeals cited *Ex Parte Jackson*, 96 U.S. 727 (1878), which stated in relevant part:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. 96 U.S. at 733.

Accord, *United States v. Chadwick*, 433 U.S. 1, 10 (1977); *Walter v. United States, supra*, 447 U.S. at 654 n. 5. As Chief Justice Burger also recognized in *Chadwick*,

> Respondents' principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private. * * * 433 U.S. at 14 n. 8.

See also, *Arkansas v. Sanders*, 442 U.S. 753, 762 (1979); *Robbins v. California*, 453 U.S. 420, 426 (1981).[1]

[1]Respondents do not understand *United States v. Ross*, 456 U.S. —, 102 S.Ct. 2157 (1982) to have affected the viability of the portions of the opinions cited.

This case does not involve, therefore, any question of the Respondents' legitimate expectation of privacy in the package searched. Rather, it involves whether Government agents may extend the scope of a search which has already been conducted by private parties. This is the question answered in the negative by the Court of Appeals (App. A, 5a) and by this Court in *Walter*, 447 U.S. at 656-657.

It is undisputed that in their examination of the package, Federal Express employees only looked at the plastic bags containing the white powder, and did not open them nor remove any of the contents. After their examination, the package was partially re-wrapped (S.H. 56), and the powder contained within the plastic bags, which in turn were contained within the tube of the duct tape, which in turn was covered by newspaper, could not be seen when the package was turned over to the narcotics agents. (S.H. 57).[5] Therefore it is clear that the withdrawal of samples and field-testing of the powder from the plastic bags clearly was more extensive than the search by Federal Express. In light of these facts, the Government's position that *Walter* "does not at all" (Pet. at 8) support the conclusion of the Court of Appeals is unfounded. In *Walter*, a private carrier delivered twelve large, sealed packages containing 871 boxes of film to the wrong company. Employees of that company opened the boxes, discovering that they had suggestive drawings on one side and explicit descriptions of the sexual contents on the other, with one employee attempting, unsuccessfully, to view the films by holding them up to the light. Once the contents of the boxes had been thus examined, the FBI was contacted, and lawfully acquired possession of the boxes of film. However, without making any

[5]The finding of the Court of Appeals that the plastic bags were visible from the end of the duct tape tube is to the contrary. (App. A, 1a).

effort to obtain a warrant, the FBI viewed the films with a projector, some as late as two months after taking possession. The defendants were tried and convicted of obscenity charges after a motion to suppress was denied; this Court reversed, finding that

> the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. 447 U.S. at 654.

The Court explained that merely because the FBI lawfully obtained possession of the boxes, it did not necessarily follow that they were given authority to search the contents, since "an officer's authority to possess a package is distinct from his authority to examine its contents." Ibid. (Fn. omitted).

Finally, the Court found unpersuasive the fact that the employees of the private business concern had searched the boxes before the Government instituted any search.

> Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse the failure to obtain a search warrant. . . . In this case there was nothing wrongful about the government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties. Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the government argues that the limited private search justified an unlimited official search. That argument must fail, whether we view the official search as an

> expansion of the private search or as an independent search supported by its own probable cause. 447 U.S. at 656.

For constitutional purposes, the conduct of the narcotics agents here is indistinguishable from that of the FBI agents in *Walter:* there was a private search of the contents of the package; the agents obtained custody of the package lawfully; but once the agents obtained possession of the package, they executed an unlimited official search, which went beyond the scope of the private search. *Walter* therefore squarely controls this case.[*] Respondents clearly had a legitimate expectation of privacy in the package; the package lawfully came into government possession; but once the agents conducted a search more extensive than that conducted by Federal Express, they violated the Fourth Amendment.

2. The Government next suggests that review should be granted because the Court of Appeals noted the conflict between its decision and that of the Sixth Circuit in *United States v. Barry*, 673 F.2d 912 (6th Cir.), cert. den. 103 S.Ct. 238 (1982). (Pet. at 10; App. A, 6a n.4). In *Barry*, a damaged package was examined by Federal Express employees, who opened and discovered it to contain four large bottles of methaqualone pills. Because of the large number of pills and effacement of the pharmaceutical numbers, the DEA was notified. Agents removed five pills for testing, and then returned the package to Federal Express.

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[*]The government claims that the implication of First Amendment rights "played a role" in the decision in *Walter v. United States*, 447 U.S. 649 (1980). (Pet. at 8). The opinion of the Court observed that the warrant requirement must be "scrupulously observed" where materials arguably protected by the First Amendment are involved. 447 U.S. at 655 & n. 6. It does not appear, however, that the nature of the materials searched without a warrant were critical to the outcome in *Walter*.

The defendant was arrested when he picked the package up.

The Court of Appeals held that the search (removing the pills for testing) could not be justified by the "plain view" exception to the warrant requirement because two essential elements—exigency and inadvertency—were not present. 673 F.2d at 918. However, the Court found that there was no Fourth Amendment violation because Barry had no legitimate expectation of privacy in the contraband at the time of seizure.

> Barry and his supplier . . . could have taken greater precautions to disguise the shipment. They chose not to. Instead, they shipped a large quantity of pills in clear bottle which were plainly labeled Methaqualone. In addition, the prescrpition numbers on the labels had been effaced. In light of Barry's failure to take precautions to protect his privacy interest from the risk of exposure inherent in his bailment, we find that he had no reasonable expectation of privacy in his drug parcel. 673 F.2d at 919.

One's interest in privacy, of course, is in the contents of a package, as clearly established above. In any event, the case is factually distinguishable, as the cocaine here was contained within four plastic bags, enclosed in duct tape, covered by newspaper, contained within a box and not visible to the agents when they seized it.* The same was not true for the methaqualone.

Barry also found *Walter* distinguishable, stating that

> *Walter* turned on the fact that the material seized was protected by the First Amendment. The chemical testing of Barry's pills was simply not an investigation

*See note 2, *supra*.

> on the scale required in *Walter* to adjudge the obscenity of the films. It was at most routine. 673 F.2d at 920.

As we observed above, *supra* n. 3, we disagree with the Sixth Circuit's analysis of *Walter* and submit that any First Amendment considerations existent there were not determinative of this Court's decision. Accord, App. A, 6a-7a n. 4.

We also disagree with the *de minimus* theory apparently suggested by the Court of Appeals' language. We are aware of no doctrine that "minor" or "routine" illegal searches do not result in suppression, but "major" ones do. Once an individual's actual expectation of privacy and the reasonability of that expectation have been established, *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740 (1979), the magnitude of the intrusion is irrelevant.

Thus, although demonstrably wrongly decided, *Barry* is distinguishable and therefore certiorari is not required to reconcile any conflict. Finally, not one of the other cases cited by the Government (Pet. at 10-11) discusses *Walter;* and in all but one[5] the issue involved was a private versus government search, which is expressly not involved here. See, *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921). The cases are therefore totally inapposite to the granting of certiorari here.

3. Finally, the Government asserts that by allowing the decision of the Court of Appeals to stand, law enforcement efforts will be severely hampered (Pet. at 11), warrants will be required for all field tests of suspected nar-

[5] *United States v. Rodriguez*, 596 F.2d 169 (6th Cir. 1979) (plain view).

cotics (ibid.) and warrants will be required for laboratory analyses of lawfully seized samples of suspicious substances. (Pet. at 12). The hyperbolic reasoning underlying these assertions shows that the Government fails to correctly perceive the import of the Court of Appeals' ruling.

The Eighth Circuit held that the scope of the Government's search exceeded the scope of the private search and because there were no exigent circumstances a warrant was required. (App. A, 6a). This ruling clearly follows the holding in *Walter* that the "strict limitation" applicable to the particular description requirement in a search warrant must as well be applied to the scope of a government search which follows a private search. 447 U.S. at 657.

The Court of Appeals did not hold, however, that *every* field test requires advance judicial authorization. The decision in no way suggests nor indicates that a warrant would be required when suspected contraband is in plain view (drugs falling out of a broken package), where there is consent (a traveler relinquishing his package for examination), under exigent circumstances, which were expressly not present here (a consignee arriving to pick up his package) or any other exception to the warrant requirement which may arise.

The Government's logic is carried to its illogical extreme in asserting that search warrants will be required for laboratory testing of *lawfully seized* substances if the Court of Appeals' decision stands. The presence of a substance in a laboratory suggests that it was obtained pursuant to warrant, incident to arrest, from a hand-to-hand buy, or some other form of law enforcement activity. In any event, no matter how custody was obtained, the Government is then free to perform whatever testing it desires. If the substance

has been seized illegally, the results of the testing will be of no avail; if seized lawfully, the Government has already gained lawful possession and control—in effect ownership —and we are aware of no constitutional doctrine in this case or any other which would require a search warrant before testing is performed. To suggest otherwise is pure sophistry.

In the unusual case[4]—such as that here—narcotics officers will be required to get a warrant. However, the period of resultant delay will probably not be "considerable" as the Government suggests (Pet. at 11), as experienced officers can easily obtain a warrant in an hour or less. And, obtaining a warrant will hardly impede an investigation where the officers already possess the package and can easily pursue other required attendant investigation while the warrant is obtained. Finally, the possibility of prejudicing innocent parties is remote at best: those possessing packages with illicit substances can be (and usually are) allowed to leave while a warrant is obtained; packages containing legal substances will presumably be searched with consent.

In any event,

> the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. * * * The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sac-

[4]Our research discloses that this case and *United States v. Barry*, 673 F.2d 912 (6th Cir.), cert. den. 103 S.Ct. 238 (1982) are the only federal decisions to discuss *Walter* in this context. The issue is also sub judice in *United States v. Bradley and Diane Pfeifer*, 9th Cir. Nos. 82-1498, 82-1499.

rificed in the name of maximum simplicity in enforcement of the criminal law. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). (Citations omitted).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MARK W. PETERSON
Suite 100 Marquette Building
400 Marquette Avenue
Minneapolis, Minnesota 55401
(612) 339-8626
Attorney for Respondents

No. 82-1167

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND DONNA MARIE JACOBSEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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REPLY MEMORANDUM FOR THE UNITED STATES

1. Respondents repeatedly assert that the DEA agents conducted an "unlimited" search (Br. in Opp. 8) that "was more extensive than the search by Federal Express" (*id.* at 6). But respondents acknowledge that Federal Express employees opened the package, and removed and viewed the powder inside the transparent container (*ibid.*). Indeed, the court of appeals, which ruled in respondents' favor, stated that the powder was visible at the time the package was given to the agents by the Federal Express employees (Pet. App. 1a; see Br. in Opp. 6 n.2).[1] Respondents suggest that the agents exceeded the scope of the private search by removing samples of powder from the transparent container. See, *e.g.*, Br. in Opp. 6, 8. But as we explained in

[1]Respondents assert that this is not true (Br. in Opp. 6) but they do not dispute the principle that the government infringes no legitimate expectation of privacy so long as it does not exceed the scope of a previous private search—no matter what condition the package is in

the petition, this action cannot possibly be characterized as a search, because the powder had already been fully exposed to view by the Federal Express employees. See Pet. 10 n.6. Neither respondents nor the court of appeals has suggested that the taking of samples was an impermissible seizure—which it plainly was not. See *ibid.*

Thus the only respect in which the agents can be said to have gone "beyond the scope of the private search" (Br. in Opp. 8) was in conducting the field test. But as we explained in the petition (Pet. 7-9), the field test was capable of revealing only one fact—whether or not the powder that appeared to be cocaine was in fact cocaine. That test was incapable of revealing any information whatever about an innocent substance, or about innocent persons or innocent activities. The field test therefore could not have defeated any legitimate expectation of privacy, or infringed any interest protected by the Fourth Amendment, and no purpose whatever is served by requiring a warrant before such a test is conducted.

Respondents offer no arguments refuting the correctness of our position that the field test simply does not implicate Fourth Amendment values. Respondents do not identify any legitimate privacy interest they have in concealing the contraband nature of the suspicious powder that was lawfully in the agents' possession; nor do they explain how the agents' action could possibly have exposed to the agents, or given them knowledge of, anything else that petitioners had a legitimate interest in keeping private once the Federal Express employees had opened the package. Respondents

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when the private parties deliver it to the government (see *Walter* v. *United States*, 447 U.S. 649, 656, 659 & n.14 (1980) (opinion of Stevens, J.); *id.* at 663 (Blackmun, J., dissenting))—and they do not dispute that Federal Express employees viewed the powder in the transparent container.

also do not cite a single case in which a court has suggested that any interests of the kind affected by the field test are entitled to the protection of the Warrant Clause.

2. Respondents urge (Br. in Opp. 9-10) that the court of appeals was mistaken in describing *United States* v. *Barry*, 673 F.2d 912 (6th Cir. 1982), cert. denied, No. 81-6942 (Oct. 12, 1982), as presenting "almost identical circumstances" and in saying (Pet. App. 6a n.4) that its decision conflicted with *Barry*. But in both cases the defendants shipped contraband in closed, opaque packages; in both cases, private shippers opened the packages, discovered suspicious substances, and notified the authorities; in both cases, the authorities then conducted a chemical analysis. The fact that the contraband in *Barry* was labelled "Methaqualone," while the contraband nature of respondents' cocaine was apparent only from its appearance and packaging, is immaterial; respondents point to nothing in the court of appeals' opinion suggesting that the court would have upheld the field test if the plastic bags containing respondents' cocaine had been so labelled.[2]

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[2]Respondents disagree with our contention that the logic of the court of appeals' ruling would extend to "laboratory testing of *lawfully seized* substances" (Br. in Opp. 11, emphasis in original). But respondents concede that their package "lawfully came into government possession" (*id.* at 8) and that private parties had already exposed the cocaine to plain view. Respondents do not explain why the court of appeals would distinguish this case from one in which the authorities have lawfully obtained possession of contraband through some means other than the actions of private parties.

For these reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

MARCH 1983

DOJ-1983-03

No. 82-1167

In the Supreme Court of the United States

OCTOBER TERM, 1982

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether law enforcement officers must obtain a search warrant before conducting a chemical field test to determine whether a substance that has lawfully come into their possession and that appears to be cocaine is in fact cocaine.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 683 F.2d 296.

JURISDICTION

The judgment of the court of appeals (Pet. App. 11a) was entered on July 27, 1982. A petition for rehearing was denied on October 14, 1982 (Pet. App. 10a). On December 2, 1982, Justice Blackmun extended the time in which to file a petition for a writ

of certiorari to and including January 12, 1983. The petition was filed on that date and granted on March 7, 1983 (J.A. 76). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, respondents were each convicted of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and conspiring to commit that offense, in violation of 21 U.S.C. 846. Respondent Bradley Jacobsen was also convicted of assaulting a federal officer, in violation of 18 U.S.C. 111 (Pet. App. 3a).[1] The court of appeals reversed all the narcotics convictions on the ground that they were based on evidence obtained in violation of the Fourth Amendment (*id.* at 8a).[2]

1. On May 1, 1981, an employee of Federal Express, a private freight carrier, discovered that a cardboard box given to Federal Express for shipment had inadvertently been damaged in transit (Pet. App. 1a). Pursuant to a written company policy adopted "because of the possibility of insurance

[1] Respondent Bradley Jacobsen was sentenced to a term of one year's imprisonment and three years' special parole on the substantive narcotics count, a consecutive term of six months' imprisonment on the assault count, and a concurrent term of one year's imprisonment on the conspiracy count. Respondent Donna Jacobsen was sentenced to a one-year term of imprisonment and a three-year special parole term on the substantive count, and a concurrent one-year prison term on the conspiracy count, but her sentences were suspended and she was placed on three years' probation on the condition that she serve three months in a jail-type facility. Pet. App. 3a n.1.

[2] The court of appeals affirmed Bradley Jacobsen's assault conviction (Pet. App. 8a).

claims" (*id.* at 17a), a Federal Express supervisor ordered that the package be completely opened. Inside the package was a ten-inch-long tube wrapped with gray tape; inside the tube were four transparent plastic bags, one inside the other. Federal Express employees cut open the tube, removed the bags, and saw that the innermost bag contained a white powder. *Id.* at 1a, 17a; J.A. 25, 41.

The Federal Express employees believed that the white powder might be an illicit substance, and they notified the Drug Enforcement Administration. They also replaced the bags in the tube and placed the tube in the open box. DEA agents went to the Federal Express office, removed the bags from the tube, and conducted a chemical field test on a small sample of powder from the plastic bags. The test indicated that the powder was cocaine. Pet. App. 1a-2a, 18a; J.A. 60. The package was later found to contain approximately six and one-half ounces of cocaine, with a street value of over $72,000 (J.A. 69; Tr. 120, 441).[3]

The DEA agents then rewrapped the package after extracting another sample for further laboratory testing. The package had been addressed to "Mr. D. Jacobs" at an address that the agents ascertained to be respondents' residence. DEA computer files mentioned respondent Bradley Jacobsen in connection with two previous reports of cocaine distribution. On the basis of that information and what they had learned at the Federal Express office, the agents sought and obtained a warrant to search the house to which the package was addressed. Pet. App. 2a, 18a-19a.

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[3] "Tr." refers to the trial transcript.

That afternoon, DEA Agent Lewis, in ordinary clothes, went to respondents' house and delivered the rewrapped package. Respondent Donna Jacobsen signed for the package and accepted it. Approximately one hour later, Agent Lewis returned to the house with the search warrant and several other officers. Respondent Bradley Jacobsen opened the door, and Agent Lewis identified himself as a law enforcement officer. Bradley Jacobsen then slammed the door into Agent Lewis's face, breaking his glasses and knocking him down, and yelled: "Its the police—flush it." Pet. App. 2a, 19a; Tr. 43.

The officers forced the door open and entered the house. They found traces of cocaine, cocaine paraphernalia, and burned remnants of the package. Pet. App. 2a.

2. Before trial, respondents unsuccessfully moved to suppress the evidence found in their house. The district court noted that respondents "concede that the initial search of the package and discovery of the cocaine by the Federal Express employees was not proscribed by the fourth amendment because it was done by private persons" (Pet. App. 13a). The district court also ruled that "when a private person makes an initial search of a closed container and then turns the container over to government authorities, the reopening of the container does not constitute a separate search requiring a warrant" (*id.* 14a-15a).

The court found that before the DEA agents arrived at the Federal Express office, "the Federal Express employees had already opened the box and removed the bags containing the white powder from the gray tube" (Pet. App. 15a). Consequently, "[t]he only investigation of the contents of the box

beyond the investigation by Federal Express employees was the field test by the DEA agents" (*ibid.*). The district court then rejected as "without foundation" respondents' contention that "when federal agents lawfully receive possession of a substance they believe to be contraband, they must obtain a search warrant before [performing] a field test to verify the chemical content of the contraband" (*ibid.*).

3. The court of appeals held that the district court erred in not suppressing the evidence found in respondents' house. The court of appeals noted that respondents did not contend that the Federal Express employees' inspection of the package violated the Fourth Amendment. The court also stated that the government's examination of the package would not violate the Fourth Amendment so long as it was "confined to what [was] exposed by the private search." Pet. App. 5a. But the court of appeals upheld respondents' contention that "the federal agents' search exceeded the scope of the private search" (*id.* at 4a; see *id.* at 5a-6a). The court ruled that "[t]he private search in this case exposed bags of powder, but [respondents'] initial reasonable expectation of privacy that the package's contents would remain private was not entirely frustrated by the private search" (*id.* at 6a).

Specifically, the court of appeals held that the agents violated the Fourth Amendment by conducting the field test of a sample of the powder. The court relied exclusively on *Walter* v. *United States*, 447 U.S. 649 (1980), in which four Justices of this Court (with a fifth, Justice Marshall, concurring in the judgment) concluded that federal agents violated the Fourth Amendment when they failed to obtain a warrant before viewing, with the aid of a projector, films

that private parties had lawfully acquired and delivered to them but had not themselves viewed on a projector. The court of appeals declared that "[t]he invasion of privacy and collection of inculpatory evidence involved in testing unidentified substances is parallel to the investigation and intrusion involved in screening a film" (Pet. App. 7a n.4). The court explained (*id.* at 6a):

> The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder.

The court of appeals accordingly concluded that, because none of the recognized exceptions to the warrant requirement applied, the DEA agents violated the Fourth Amendment when they conducted the field test without a warrant. The court then noted that "[t]he finding of cocaine in a package being sent to [respondents'] home was the core of the affidavit which justified the issuance of the warrant to search the * * * home" (Pet. App. 8a), and it asserted that "[w]ithout the statement that a test indicated the presence of cocaine in the powder, the affidavit does not provide probable cause to believe [respondents] possessed cocaine in their home" (*ibid.*). The court ordered that the fruits of the search of respondents' home—drug paraphernalia, traces of cocaine, and

burned remnants of the package—be suppressed. *Ibid.*

Senior District Judge Becker, sitting by designation, concurred specially "with serious reservations" (Pet. App. 9a). He indicated that he believed the decision in *Walter* required the result reached by the court of appeals but that he agreed generally with the views expressed by Justice Blackmun's dissent in *Walter*. The government's petition for rehearing was denied, with three judges voting to rehear the case en banc (*id.* at 10a).

SUMMARY OF ARGUMENT

A. The court of appeals plainly erred in concluding that the agents had to obtain a warrant before conducting the field test. A chemical analysis of a substance that is already in the possession of the authorities will seldom, if ever, reveal any additional information that a reasonable, innocent person would want to keep private. Individuals simply do not use the molecular structure of a chemical substance as a respository for their secrets.

In any event, any legitimate privacy interest that a person might in some exceptional circumstances have in the chemical composition of a substance he owns is not implicated in this case. The field test conducted by the DEA agents here was capable of revealing only one thing—whether the substance discovered by the Federal Express employees was cocaine. Had that substance not been cocaine, the test would have revealed nothing about it. The test was therefore incapable of disclosing any information whatever about an innocent substance, an innocent activity, or an innocent person; the only information it revealed was information that respondents could have no legitimate interest in keeping private. For these rea-

sons, the field test could not possibly have invaded any interest protected by the Fourth Amendment. When the government is able to obtain evidence of a crime without infringing any legitimate, socially protected interest, it is simply irrational to restrict its authority to do so.

At the same time, the court of appeals' holding would impose extraordinary burdens on the investigation of drug offenses. Law enforcement officers routinely perform chemical analyses of suspicious substances, and the logic of the court of appeals' warrant requirement cannot be limited to analyses performed on substances obtained through a private search like the one involved here. Consequently, under the court of appeals' approach, law enforcement officers would have to obtain literally thousands of additional warrants each year. Moreover, although the results of field tests and chemical analyses have been used in countless prosecutions in the past, we know of no other court that has ever suggested that the government must have a warrant before it can perform such a test. This consensus is further evidence that the court of appeals' novel holding here was in error.

B. Respondents also incorrectly suggest, as do certain passages in the court of appeals' opinion, that the actions taken by the agents preparatory to the chemical analysis violated the Fourth Amendment. It is clear that the agents lawfully came into possession of the package that had been sent to respondents; that package was initially searched by private parties —the Federal Express employees—who turned it over to the DEA, and it is well established that the Fourth Amendment does not apply to private searches. In removing the transparent bags from the package, the agents did not exceed the scope of the private search. Nor was it a search to open the plastic bags in order

to obtain a sample for testing; a transparent container is the best example of a container the "contents [of which] can be inferred from [its] outward appearance." *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979). Finally, the removal and destruction of the minuscule amount of cocaine needed for testing did not violate the Fourth Amendment; in view of the small amounts involved, and the abundant grounds the agents had to believe that it was contraband, this was surely not an unreasonable seizure, if it was a seizure at all. In any event, probable cause alone, without a warrant, ordinarily suffices to sustain the reasonableness of a seizure.

ARGUMENT

THE AGENTS WERE NOT REQUIRED TO OBTAIN A WARRANT BEFORE CONDUCTING A CHEMICAL TEST OF THE POWDER LAWFULLY IN THEIR POSSESSION TO DETERMINE WHETHER IT WAS COCAINE

The court of appeals' reversal of respondents' convictions appears to rest in large measure, if not entirely, on the conclusion that the chemical field test was a search within the meaning of the Fourth Amendment because it "revealed * * * the composition of the powder" (Pet. App. 6a), and that it accordingly could not be undertaken without a warrant. We first explain, in subpoint A, why this unprecedented and mischievous conclusion is plainly wrong. Then, in subpoint B, we refute the contention apparently made by respondents (see Br. in Opp. 6-8), with some support from passages in the court of appeals' opinion, that actions taken by the agents preparatory to the field test—such as removing the plastic bags from the tube and extracting samples for testing—also violated the Fourth Amendment.

A. Law Enforcement Officers Need Not Obtain a Warrant Before Conducting Any Chemical Analysis, and a Chemical Analysis That Reveals Only Whether a Substance Is Contraband Is Not a Search Within the Meaning of the Fourth Amendment.

1. The Fourth Amendment does not regulate every action that a law enforcement officer takes in investigating crime; it applies only to "searches and seizures." And the government has not conducted a search unless it has intruded on some person's "legitimate expectation of privacy." See, *e.g.*, *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), slip op. 4-5; *Smith* v. *Maryland*, 442 U.S. 735, 740-741 (1979); *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968). It is not enough, of course, that a person expects, or hopes, that his activities will go unnoticed by the authorities; that "expectation [must] be one that society is prepared to recognize as 'reasonable'" or legitimate. *Katz* v. *United States*, 398 U.S. 347, 361 (1967) (Harlan, J., concurring); see, *e.g.*, *Rakas* v. *Illinois*, 439 U.S. 128, 144 n.12 (1978).

The concept of a "legitimate" expectation of privacy is not self-defining. To a considerable extent, of course, the Court looks to whether the information in question was acquired by seeing or hearing that which is exposed to public perception. A government agent can learn a great deal of information about an individual by, for example, tracking his movements on the public roads for an extended period of time or recording the telephone numbers he dials, but the Court has concluded that neither of these investigative measures constitutes a search regulated by the Fourth Amendment. *United States* v. *Knotts*, *supra*; *Smith* v. *Maryland*, *supra*. Even where there is some intrusion into areas that are not public, such as privately owned but open fields, the Court considers the extent to which a typical member of our society would

reasonably expect to maintain a meaningful degree of privacy from uninvited intruders; where there would in practice be little or no such expectation, an official intrusion into the area is not considered a search. *Hester* v. *United States*, 265 U.S. 57 (1924). The Court similarly draws upon common understandings about society's weighting of personal privacy interests in assessing the "standing" of a particular defendant to complain about a search that does invade the privacy interests of someone, but not necessarily of the individual before the bar. See, *e.g.*, *Rawlings* v. *Kentucky*, 448 U.S. 98, 104-105 (1980); *Rakas* v. *Illinois*, *supra*, 439 U.S. at 140-149. The fundamental theme informing these related inquiries is that the protections afforded by the Fourth Amendment apply only where there is a significant danger that government action will intrude into an area which a significant segment of our society regards as enjoying meaningful privacy attributes—that is, where there is a material danger that the government action will reveal matter both that people generally wish to guard from public knowledge and that they have taken reasonable precautions to conceal from public access.

2. a. Once the authorities have lawfully come into possession of a substance, a chemical analysis of it will seldom reveal any additional information that its owner might legitimately wish to keep private. For that reason, a chemical analysis will rarely, if ever, interfere with any interest protected by the Fourth Amendment.

Individuals simply do not "lock" their secrets into the molecular structure of a substance in the way they might, for example, place private objects in certain containers, private thoughts on a tape recording, or private activities on film. An analysis might enable the government to learn that a white powdered substance that appeared to be an illicit drug was

actually talcum powder or sugar; but in learning that a suspicious substance already visible to government agents is actually some innocent material, the government has not invaded any person's privacy in any meaningful way. Indeed, people routinely label innocent substances, so that their composition will be immediately apparent to anyone who is entitled to view them. When an innocent substance is not labelled, that is generally because a label is unnecessary, not because the composition of the substance is a secret. It is almost always a matter of indifference to the owner of an innocent substance whether another person who is legitimately in possession of it and is entitled to examine it visually knows its chemical composition as well.[4]

We recognize that it is possible to imagine a case in which a person might legitimately wish to keep private the chemical composition of a substance in his possession—for example, if it is a lawful drug that is used to treat mental illness. Cf. *Whalen* v. *Roe*, 429 U.S. 589, 599-602 (1977). Even in such a case, however, a chemical analysis can disclose only a limited, discrete piece of information about a person. It is not remotely as intrusive as a search of a person's papers or effects.

More important for purposes of this case, in most investigations of illegal drug activity, it will be entirely clear to the authorities, before they conduct any chemical analysis, that they are not dealing with

[4] To the extent that the court of appeals' rationale depends upon the supposed impropriety of investigation "by using mechanical or chemical means to discover the hidden nature of the objects" (Pet. App. 6a), it would not require law enforcement agents to obtain a warrant before they "analyzed" a substance by tasting it or inhaling it in the way that a user of cocaine would inhale it. But such a "test" is only a somewhat less reliable (and obviously less desirable) means of identifying the chemical content of a substance.

such a medically sensitive substance. Lawful but medically sensitive drugs are stored, shipped, packaged, and used in an entirely different way from illicit substances. No user of a medically sensitive drug, for example, would package or ship it in the way in which the cocaine involved here was sent to respondents. In a case in which there is a realistic possibility that the authorities are in possession of a drug or other substance the composition of which a person might legitimately wish to keep private, it might be appropriate to require them to have some degree of particularized suspicion before they conduct a chemical analysis.[5] But this is not such a case.[6]

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[5] Even in such a case, we see no sufficient justification for requiring probable cause, and certainly no basis for a warrant requirement. First, as we noted, because a chemical analysis can disclose, at most, only a narrow piece of information, it is not nearly as intrusive as a search of a person's papers or effects. Second, any lawful drug or chemical of a sensitive nature will, in all probability, already be subject to extensive government regulation; the fact that a particular individual possesses it will, therefore, already be known to others and may be accessible to the government in appropriate circumstances. Cf. *United States* v. *Miller*, 425 U.S. 435 (1976). Third, before law enforcement officers can conduct a chemical analysis of a substance, they must have lawfully obtained possession of it. Any expectation of privacy will, therefore, already have been compromised to a substantial degree before the analysis is conducted. Finally, it is unlikely that a warrant requirement will provide any significant additional protection in these circumstances. In general, a law enforcement officer must seek a warrant when he is confronted with the question whether a variety of complex facts amount to probable cause to believe that criminal activity is afoot. It will generally be far easier for an officer to decide whether a particular substance, already in his possession, is probably contraband.

[6] Moreover, the DEA agents had abundant affirmative grounds to believe that they were dealing with an unlawful drug in this case (see pages 25-26 and note 15, *infra*).

b. In any event, any privacy interests that might be affected by a chemical analysis that reveals the precise composition of a substance are not implicated in this case, because the field test the agents performed was capable of determining only whether the substance lawfully in their possession was in fact cocaine. Had the substance not been cocaine, the test would have revealed nothing else about it.[7] The test therefore could not have revealed any information at all about an innocent substance, an innocent activity, or an innocent person. Because the field test could not have interfered with any interest that is even arguably protected by the Fourth Amendment, it cannot be regarded as a search within the meaning of the Amendment.

The purpose of the Fourth Amendment is to protect against unreasonable government intrusion into individuals' innocent private affairs, not to give criminals greater security in their illicit enterprises. The Fourth Amendment regulates certain investigative actions not because they uncover evidence of crime but because most such actions, in the course of uncovering information concerning illegal conduct, will unavoidably also reveal information about lawful activity, or otherwise invade legitimate interests that the Fourth

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[7] At trial, the agent who conducted the field test described it as "a Scott reagent field test * * * for cocaine" (J.A. 72) and briefly explained its operation. The DEA informs us that this test will reveal only whether or not a substance is cocaine; if it is not cocaine, the test will not reveal its composition. This fact was not brought out at the suppression hearing or the trial, because neither focused on the precise nature of the test. But the court of appeals did not suggest that it believed that the test revealed more than whether a substance is cocaine, and the court of appeals' holding does not rest on the premise that the test would reveal any other information.

Amendment protects. Indeed, many investigative techniques—such as the surveillance of a person in a public place, or the monitoring of an individual's conversations with a person whom he does not know to be a government informer—are unquestionably not searches even though they reveal to the authorities much information that an innocent person might well want to keep private.

But the field test at issue here could not have disclosed *any* information about lawful activity. It was capable of revealing information only about illegal conduct. Nor did it in any other way constitute an " 'intrusion upon cherished personal security' " (*Cupp* v. *Murphy*, 412 U.S. 291, 295 (1973), quoting *Terry* v. *Ohio*, *supra*, 392 U.S. at 24-25) or otherwise interfere with any interest arguably protected by the Fourth Amendment. There is, accordingly, no basis for concluding that this technique is subject to the Fourth Amendment. When the authorities are able to obtain evidence of a crime without infringing any legitimate private interest, it is simply irrational to restrict their authority to do so by imposing procedural requirements that cannot serve to protect significant individual rights.

Of course, the purpose of the field test was to reveal information about respondents' activities that they undoubtedly were eager to keep private—the fact that the substance discovered by the Federal Express employees was cocaine. But the desire to keep this information from the authorities is perhaps the best example of a privacy interest that society is *not* "prepared to recognize as 'reasonable' " (*Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring)). Society has no reason at all to protect a person's hope or

expectation that his crime will escape detection, and that is the only expectation that could possibly have been jeopardized by the DEA agents' field test.[8] Cf. *Roberts* v. *United States*, 445 U.S. 552, 557-558 (1980); *Branzburg* v. *Hayes*, 408 U.S. 665, 695-697 (1972); pages 24-25, *infra*.

Walter v. *United States*, 447 U.S. 649 (1980), far from supporting the court of appeals' conclusion, is instructive in showing the court's error. Viewing a film discloses far more information that a person has a legitimate interest in keeping private than conducting a chemical analysis of a powder that is sus-

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[8] We do not deny that there is an important sense in which the Fourth Amendment "protects the guilty as well as the innocent": law enforcement officers who comply with the Fourth Amendment will sometimes lack the quantum of suspicion needed to conduct a search that would, in fact, have revealed evidence of a crime, and as a result a guilty person will escape detection. But this benefit to the guilty is simply an unavoidable byproduct of the protection that the Fourth Amendment affords to the innocent. It does not mean that the Framers of the Amendment intended to give guilty persons a "right" to avoid detection. The rights of innocent persons can be adequately protected only if insufficiently supported searches are proscribed before they are even conducted, at a time when it is impossible to be certain whether the search will uncover evidence of crime; as a result, some guilty parties must, unfortunately but unavoidably, escape detection if the Amendment is to protect the innocent.

This case, however, involves an investigative technique that cannot possibly intrude on the rights of the innocent; it can invade a "privacy" interest only of a person engaged in criminal activity. It is obviously unreasonable to restrict the use of such a technique in the ways that techniques that could invade the privacy interests of innocent persons may appropriately be restricted.

pected of being a controlled substance. Viewing a film reveals much about the ideas and attitudes of the person who made it, and about the interests and tastes of the recipient. See *Stanley* v. *Georgia*, 394 U.S. 557, 565 (1969); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952). This is true even if, as in *Walter*, the contents of the film are described on its container; specific aspects of the film may reveal additional facts. Partly for these reasons, the viewing of a film implicates the First Amendment, which played a role in *Walter*. See 447 U.S. at 655 & n.6 (opinion of Stevens, J.); *Roaden* v. *Kentucky*, 413 U.S. 496, 502 (1973), quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 472 (1971) ("The seizure of instruments of a crime, * * * or 'contraband * * *' [is] to be distinguished from quantities of books and movie films when a court appraises the reasonableness of the seizure under Fourth or Fourteenth Amendment standards."). A chemical analysis is incapable of disclosing even remotely comparable information or of invading an individual's privacy to a comparable degree, and there is no justification for the court of appeals' ill-considered equation of the viewing of a film with a chemical analysis.

3. The court of appeals' holding that a chemical analysis requires a warrant not only protects no legitimate privacy interest; if the court's approach were to prevail, it would impose extraordinary burdens on the investigation of narcotics offenses. Chemical analyses are, obviously, often indispensable in deciding whether to pursue an investigation further, as well as in proving a case against a person charged with a drug offense. As a result, law enforcement agents have tested suspicious substances—either in the field or in a laboratory—on innumerable occasions.

In this case, the substance came into the agents' possession as the result of the private search by Federal Express employees, but the logic of the court of appeals' holding cannot be confined to such cases. The court of appeals would apparently rule that the government conducts a search whenever it performs a test that "reveal[s] * * * the composition of [a] powder" (Pet. App. 6a) unless, presumably, all those able to claim an interest in the powder have relinquished their claim to keep its composition secret. Thus, under the court of appeals' ruling, law enforcement agents would certainly have to seek a warrant every time they wished to conduct a test on a substance obtained through a warrantless search—such as a probable cause search of a vehicle or a search incident to arrest, which are both common means of uncovering illicit drugs. The authorities might also have to seek a second warrant every time they wished to test a substance seized pursuant to a search warrant that did not specifically authorize a chemical analysis.

As a result, under the court of appeals' approach, law enforcement agents would have to obtain literally thousands of additional warrants each year. This massive burden on law enforcement and judicial resources is itself good reason to hesitate before imposing a warrant requirement. In addition, many investigations that could be aided by a chemical analysis would be impaired, either because the agents lacked probable cause or because they could not afford to expend the time and effort needed to obtain a warrant. And these costs would be incurred even though there is no offsetting benefit to legitimate privacy interests.

Although the results of chemical analyses have been used in countless narcotics prosecutions in the

past, we know of no other court that has ever suggested that the warrant is required before the government may undertake a chemical analysis. On the contrary, every other court of appeals has rejected, either expressly or by implication, the view that a chemical analysis requires a warrant. See, *e.g.*, *United States* v. *Barry*, 673 F.2d 912 (6th Cir. 1982), cert. denied, No. 81-6942 (Oct. 12, 1982); *United States* v. *Russell*, 655 F.2d 1261, 1263-1264 (D.C. Cir. 1981), modified on other grounds, 670 F.2d 323, cert. denied, 457 U.S. 1108 (1982); *United States* v. *Jennings*, 653 F.2d 107, 108 (4th Cir. 1981); *United States* v. *Walther*, 652 F.2d 788, 790 (9th Cir. 1981); *United States* v. *Williams*, 622 F.2d 830, 834 & n.8, 839 (5th Cir. 1980) (en banc), cert. denied, 449 U.S. 1127 (1981); *United States* v. *Andrews*, 618 F.2d 646 (10th Cir.), cert. denied, 449 U.S. 824 (1980); *United States* v. *Bulgier*, 618 F.2d 472, 474 (7th Cir.), cert. denied, 449 U.S. 843 (1980); *United States* v. *Nieves*, 609 F.2d 642, 644, 647-648 (2d Cir. 1979), cert. denied, 444 U.S. 1085 (1980); *United States* v. *Edwards*, 602 F.2d 458 (1st Cir. 1979); *United States* v. *Rodriguez*, 596 F.2d 169, 173-175 (6th Cir. 1979); *United States* v. *Belle*, 593 F.2d 487, 491, 499-500 (3d Cir.) (en banc), cert. denied, 442 U.S. 911 (1979); *United States* v. *Crabtree*, 545 F.2d 884 (4th Cir. 1976); *United States* v. *Ford*, 525 F.2d 1308, 1312 (10th Cir. 1975). See also *People* v. *Adler*, 50 N.Y.2d 730, 732 n.4, 409 N.E.2d 888, 891 n.4, 431 N.Y.S.2d 412, 416 n.4, cert. denied, 449 U.S. 1014 (1980).

B. The Actions Taken By the Agents Preparatory To the Chemical Analysis Did Not Violate the Fourth Amendment

Although the principal basis of the court of appeals' holding was its conclusion that the chemical analysis was a search requiring a warrant, respond-

ents suggest (Br. in Opp. 6-8) that the agents also violated the Fourth Amendment when they took other actions preparatory to performing the analysis—such as removing the plastic bags from the box, or extracting samples from the plastic bags in order to perform the test.[9] In fact, none of the actions leading up to the field test even arguably infringed any interest protected by the Fourth Amendment.

1. There is no doubt that the DEA agents lawfully came into possession of the package that had been sent to respondents. The initial search of the package was conducted by private Federal Express employees. The Fourth Amendment does not apply to private searches (*Burdeau* v. *McDowell*, 256 U.S. 465, 475 (1921)), and respondents have never contended that the government was implicated in the Federal Express employees' inspection of the package. The Federal Express employees, having inspected the package, invited the DEA agents to view its contents; the Fourth Amendment did not prohibit the agents from doing so. See *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 487-490; *Burdeau* v. *McDowell*, *supra*, 256 U.S. at 475-476.[10]

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[9] At one point the court of appeals remarked (Pet. App. 8a): "We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of [respondents'] fourth amendment rights." But it seems plain that the court of appeals' primary concern was with the chemical analysis itself, which the court equated to the viewing of a film. See *id.* at 6a, 7a n.4.

[10] In addition, the private inspection was required by the standard policies of Federal Express, as was the call to DEA when a suspicious substance was discovered. Pet. App. 17a; J.A. 46. While the courts below did not inquire into the precise terms of the bailment between Federal Express and the person

2. After they were given the partially repacked container by Federal Express, the agents removed the transparent plastic bags containing the white powder from the taped tube. This action, too, was plainly lawful. The court of appeals stated that when the agents first saw the package the bags were visible from the end of the tube. Pet. App. 1a. If this statement is correct, then the Federal Express employees had "exposed [the bags] to plain view" and " 'it was not incumbent on the [agents] to * * * avert their eyes.' " *Walter* v. *United States*, *supra*, 447 U.S. at 661 (opinion of White, J.), quoting *Coolidge* v. *New Hampshire*, *supra*, 403 U.S. at 489. That is, the removal of the bags from the tube did not expose anything to the agents' view that the Federal Express employees had not already made visible to them.

Respondents dispute the court of appeals' factual statement; they assert that the Federal Express employees had repacked the package in such a way that, when they turned it over to the DEA agents, the plastic bags were not visible. Br. in Opp. 6.[11] But as respondents and the court of appeals apparently acknowledge, nothing should turn on this factual disagreement. It is not disputed that the Federal Express employees inspected the package completely, removing the plastic bags from the tube and examining them, before they repacked it. Thus when the agents removed the bags from the package, they did not exceed the scope of the private search. Both the court

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who sent the cocaine to respondents, respondents have never suggested that the Federal Express employees' inspection of the package was tortious or otherwise improper.

[11] This factual question was not resolved by the district court, because it correctly viewed the point as "immaterial to the legal issue presented here." Pet. App. 12a-13a.

of appeals and respondents seem to accept the principle that government officials have not conducted a search within the meaning of the Fourth Amendment if they do not exceed the scope of a previous private search, no matter what condition the package is in when it is delivered to the government. See Pet. App. 5a-6a; Br. in Opp. 6 ("This case * * * involves whether Government agents may extend the scope of a search which has already been conducted by private parties.").

This principle also appears to have been endorsed by a majority of this Court (see *Walter* v. *United States*, *supra*, 447 U.S. at 656, 659 n.14 (opinion of Stevens, J.); *id.* at 663 (Blackmun, J., dissenting)),[12] and its application in this case is clearly sound. The Federal Express employees, whose actions were at all times lawful, summoned the DEA agents for the specific purpose of showing them the plastic bags containing the white powder. The employees might have chosen to leave the bags in full view while awaiting the DEA agents' arrival; or, when the agents arrived, the Federal Express employees might have removed the bags again to show the agents why they had been called. In either event the removal of the bags would have raised no Fourth Amendment question whatever. Instead, the employees apparently explained to the agents the reason they had been called and invited the agents to remove the bags that the employees had already once removed. These differ-

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[12] See also *United States* v. *Bulgier*, *supra*, 618 F.2d at 474; *United States* v. *McDaniel*, 574 F.2d 1224, 1226-1227 (5th Cir. 1978), cert. denied, 441 U.S. 952 (1979); *United States* v. *Pryba*, 502 F.2d 391, 401 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975); *United States* v. *Blanton*, 479 F.2d 327, 328 (5th Cir. 1973).

ences in the precise sequence of events cannot be constitutionally significant.[13]

3. After removing the plastic bags from the tube, the agents opened them in order to obtain a sample for testing. It is entirely clear that opening a transparent container does not constitute a search requiring a warrant. The Court has specifically so ruled:

> Not all containers and packages * * * will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be

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[13] For these reasons, the question presented by the agents' removal of the plastic bags is different from the hypothetical issue discussed by some of the opinions in *Walter*—"whether the Government's projection of [lawfully seized] * * * films would * * * infringe[] any Fourth Amendment interest if private parties had projected the films before turning them over to the Government" (447 U.S. at 660 (opinion of White, J.)). This is not a case in which the government has simply duplicated a private party's earlier invasion of privacy interests; here, the private party specifically invited the government to view the fruits of its lawful private search. The precise mechanism by which the private party makes those fruits available to the government should not be significant for Fourth Amendment purposes.

Indeed, once Federal Express employees had opened the package and inspected the plastic bags, the DEA agents could have asked Federal Express to bring the plastic bags to DEA headquarters without infringing any privacy interest—even if Federal Express had, in the meantime, repacked the package to some degree. The government could even have subpoenaed the bags when they were in the possession of Federal Express, even if the package had been repacked, without invading any protected privacy interest of respondents. See *Burdeau* v. *McDowell*, *supra*, 256 U.S. at 476. In these circumstances, the agents' decision simply to go to the Federal Express office and obtain the bags themselves cannot be said to have invaded any protected interest.

> inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.

Arkansas v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979). A transparent bag is surely the archetype of a container the contents of which can be "inferred from [its] outward appearance"; indeed, those contents were in plain view once the officers lawfully saw the plastic container. Opening the container therefore could not have infringed any interest protected by the Fourth Amendment.

4. Finally, the agents removed a small portion of the cocaine in order to test it, and this cocaine was consumed in the test. These acts were not in any sense a search, because they did not reveal anything that was not already in plain view or otherwise interfere with any privacy interest. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 7-8 (plurality opinion); *United States* v. *Lisk*, 522 F.2d 228, 230 (7th Cir. 1975) (Stevens, J.), cert. denied, 423 U.S. 1078 (1976). At most, these actions might be characterized as a seizure of a few particles of the substance. But neither respondents nor the court of appeals appears to have asserted that the removal and destruction of a few particles was an illegal seizure, and it plainly was not.

First, the agent who performed the test described the quantity involved as "a trace amount" that was much less than a gram (J.A. 75); the retention or destruction of such a small amount of a substance is de minimis. See generally *Cardwell* v. *Lewis*, 417 U.S. 583, 591 (1974) (plurality opinion); *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970). Second, it is well established that when contraband is involved, the government violates no interest protected

by either the common law (see, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294, 303-304 (1967)) or the Constitution when it engages in what would otherwise be a trespass to chattels. See, *e.g.*, *Boyd* v. *United States*, 116 U.S. 616, 623-624 (1886); *United States* v. *Washington*, 586 F.2d 1147, 1154 (7th Cir. 1978); *United States* v. *Pringle*, 576 F.2d 1114, 1119 (5th Cir. 1978); *United States* v. *Emery*, 541 F.2d 887, 890 (1st Cir. 1976).

Finally, even if the retention or destruction of a small amount of the cocaine was a seizure, the Fourth Amendment permits seizures upon probable cause without a warrant. *E.g.*, *Texas* v. *Brown*, *supra*, slip op. 8 (plurality opinion) ("[O]ur decisions have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately."); *id.* at 2 (Stevens, J., concurring in the judgment); *Payton* v. *New York*, 445 U.S. 573, 587 (1980); *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 354 (1977). A seizure that works such a minimal intrusion can surely be justified on the basis of reasonable suspicion not amounting to probable cause. See *Terry* v. *Ohio*, *supra*; *United States* v. *Van Leeuwen*, *supra*, 397 U.S. at 252-253; cf. *United States* v. *Place*, 660 F.2d 44 (2d Cir. 1981), cert. granted, No. 81-1617 (argued Mar. 2, 1983). Here, moreover, it seems beyond serious dispute that there was probable cause. It is unquestioned that the powder had the appearance of cocaine, and it is most unlikely that any lawful white powdered substance would have been shipped in such a way.[14] Thus the

[14] See *Texas* v. *Brown*, *supra*, slip op. 3 (Powell, J., concurring in the judgment) ("We are not advised of any innocent item that is commonly carried in [an] uninflated, tied-off balloon").

agents had far more than the quantum of suspicion they needed to make any "seizure" that was involved in removing a few grains of the powder for testing.[15]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ANDREW L. FREY
Deputy Solicitor General

DAVID A. STRAUSS
Assistant to the Solicitor General

JOEL M. GERSHOWITZ
Attorney

JUNE 1983

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[15] The court of appeals' apparent holding (Pet. App. 8a) that there was no probable cause until the field test had been performed is therefore obviously incorrect. This holding appears to have been unconsidered and probably unintended. Indeed, it would lead the court of appeals to the absurd conclusion that the agents were helpless to do anything to interdict the shipment of cocaine or to apprehend respondents, since on the court of appeals' view the agents, lacking probable cause, could never have obtained the warrant the court held they needed to conduct the field test.

Because the court of appeals erred in ruling that the agents lacked probable cause independent of the field test, the evidence obtained in the search of respondents' house (pursuant to the warrant) was not "tainted" by the field test. Thus, even accepting the court of appeals' conclusion that a warrant was needed before the field test could be conducted, that court erred in ordering the suppression of the evidence obtained from the house and the reversal of respondents' narcotics convictions.

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No. 82-1167

IN THE

Supreme Court of the United States

October Term, 1982

UNITED STATES OF AMERICA,
Petitioner,

vs.

BRADLEY THOMAS JACOBSEN and
DONNA MARIE JACOBSEN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS

MARK W. PETERSON
Suite 500 Builders Exchange
609 Second Avenue South
Minneapolis, Minnesota 55402
(612) 339-1431
Counsel of Record

PAULA GOODMAN MACCABEE
2304 30th Avenue South
Minneapolis, Minnesota 55406
(612) 724-8808

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding that narcotics agents violated the Fourth Amendment by conducting a more extensive warrantless search of a package than that previously conducted by private persons?

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

The government seeks reversal of the decision of the United States Court of Appeals for the Eighth Circuit that federal drug agents' unlimited warrantless search of a package previously subjected to only a limited inspection by employees of a private carrier violated the Fourth Amendment. The federal agents' search involved opening several sealed plastic bags, extracting samples of a substance and testing its chemical composition to discover the presence of cocaine. The Court of Appeals held that

evidence derived from the agents' extension of a private search should have been suppressed and reversed Respondents' convictions of drug-related offenses.

1. On the morning of May 1, 1981, an employee of Federal Express at the airport in Minneapolis, Minnesota, brought a damaged package to his supervisor's attention. Together, pursuant to company policy, they opened the package to determine possible damage to its contents. (J.A. 40; *United States v. Jacobsen*, 683 F. 2d 296, 297 (8th Cir. 1982)).

The package was approximately ten inches long, six inches wide and six inches deep. Brown wrapping paper with an airbill affixed covered a cardboard box; within the box, newspapers covered an opaque grey duct-tape tube approximately ten inches long and two inches wide. Federal Express employees opened the cardboard box and cut the duct-tape tube. Inside this closed tube were four sealed plastic bags, one inside each other, the innermost of which contained a white powdery substance. (J.A. 15, 25, 29-30, 41).

Suspecting that this powder was an illegal drug, the employees contacted the regional security manager for Federal Express, who told them to contact the local Drug Enforcement Administration. (J.A. 42, 46, 50). The plastic bags containing the powder were rolled up and replaced in the tube, which was replaced in the box. The plastic bags were visible from the end of the tube, but the white substance itself could not be seen without entering the box again. (J.A. 42-43; 683 F.2d at 297). The package was then locked in a file cabinet in the Federal Express office. (J.A. 42).

DEA Agent James Lewis received the first contact from

Federal Express around 9:00 o'clock that morning and called Agent Jerry Kramer, who was the first agent to arrive at the Federal Express office. (J.A. 23, 32). Agent Kramer took custody of the package, pulled the plastic bags out of the duct-tape container to see what was inside the tube, unrolled and unsealed the plastic bags. (J.A. 43-44, 72). He took a knife blade, removed a small amount of the white powder inside, and conducted a three-part chemical field test of the powder, which indicated the presence of cocaine. (J.A. 72, 75).

When Agent Lewis arrived at Federal Express around 10:30 a.m., Agent Kramer showed him the positive field test results. (J.A. 23). Agent Lewis brought the package to the DEA office at the airport, reopened it and weighed the cocaine. (J.A. 33, 64, 67). Agent Lewis observed that the powder "looked like sugar that had been damp". (J.A. 70). He took a second sample for further chemical tests at the DEA laboratory. (J.A. 74). Then the package was rewrapped to appear as if it had never been opened, for the purpose of a "controlled delivery" to Respondents' address, which appeared on the airbill (J.A. 17, 28, 63).

Agent Lewis, dressed to look like a delivery man, made the "controlled delivery" of the package to Mrs. Jacobsen at approximately 2:45 p.m. (J.A. 6, 9). In the meantime, other agents obtained a search warrant. (J.A. 6, 10, 17-18, 30). An hour later, Lewis returned, claiming he had not received a proper signature for the package. When he was denied entry to the residence, forcible entry was made. (J.A. 7-9; 683 F. 2d at 298).

Execution of the search warrant resulted in the discovery of residue from the package, cocaine traces, and drug paraphernalia. (683 F. 2d at 298).

2. Respondents moved to suppress the evidence obtained pursuant to warrant on the grounds that the warrant was based upon a prior illegal warrantless search, relying in part on *Walter v. United States*, 447 U.S. 649 (1980). The Magistrate (Pet. App. 24a-25a) and the District Court (Pet. App. 15a) found *Walter* distinguishable on its facts and, without discussing whether the agents' actions constituted a "search", and if so, whether any exception to the warrant requirement applied, sustained the government's position.

3. The Court of Appeals for the Eighth Circuit reversed the ruling of the District Court, finding *Walter* controlling. (683 F. 2d at 299-300). As in *Walter*, the Court of Appeals found that Respondents had a reasonable expectation of privacy in the contents of a sealed package, which expectation was not entirely frustrated by the limited private search. The court found that private parties conducted a search of the package sufficient to draw an inference about its contents, but did not open the sealed plastic bags, remove or in any way analyze the powder, and subsequently replaced the bags in the tube. DEA agents not only seized the package, but removed the bags, opened them, extracted samples and tested previously "unidentified substances", thus exceeding the scope of the private search. (683 F. 2d at 300 n. 4). Applying the doctrine established in *Walter*, the Court of Appeals ruled that absent circumstances justifying such a failure, the agents should have obtained a warrant.

> The DEA agents' extension of the private search precisely parallels that in *Walter*. In both cases, viewing the objects with unaided vision produced only an

> inference of criminal activity. In both cases, government agents went beyond the scope of the private search by using mechanical or chemical means to discover the hidden nature of the objects. The governmental activity represents a significant extension of the private searches because it revealed the content of the films in *Walter* and, here, the composition of the powder. In the absence of exigent circumstances, which the government does not allege, we hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof. 683 F. 2d at 299-300. (Fn. omitted).

Thus, "the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of defendants' Fourth Amendment rights." (683 F. 2d at 300). Since the chemical analysis identifying cocaine was "the core of the affidavit which justified the issuance of the warrant to search the Jacobsens' home," the convictive evidence discovered therefore should have been suppressed. (Ibid.). The Court of Appeals reversed Respondents' convictions on drug-related counts. The government's petition for rehearing en banc was denied. (Pet. App. 10a).

SUMMARY OF ARGUMENT

A. The opening of plastic bags, withdrawal of samples of their contents and chemical analysis of those samples constitutes a search within the meaning of the Fourth Amendment. The bags were found within a package sent by a common carrier, and as the recipients of that package Respondents had a long-established and well-recognized expectation of privacy. *Ex parte Jackson*, 96 U.S.

727, 733 (1878); *United States v. Chadwick*, 433 U.S. 1, 10 (1977). Their expectation of privacy was also one that was reasonable, as the manner of packaging established their subjective expectation of privacy, and society recognizes as reasonable a person's desire to keep the contents of containers private. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

By focusing on the nature of the "information" to be kept private and the limited nature of the information disclosed by chemical testing, the government ignores the fact that one's privacy interest is determined at the time a package is shipped, not after it has later been examined by a private party. *Walter v. United States, 447 U.S. 649,* 658-659 & n. 12 (1980). Furthermore, even though the unlimited examination of the contents of the package may have been less instrusive than other types of searches, this Court recognizes no exception providing for warrantless searches where the physical entry is "minor" or where that which can be discovered as a result of the entry is limited.

The narrow holding of the Court of Appeals that a warrant was required under the limited circumstances of this case is based upon well-established constitutional doctrine, is required by this Court's decision in *Walter v. United States, supra,* provides a workable and intelligible standard for application by police officers and imposes no excessive burden on law enforcement.

B. Having established that the actions of the government agents constituted a search, it must be determined whether that search came within one of the recognized exceptions to the warrant requirement. Instead of treating the issue as involving the permissible scope of an official search after a private search, however, the government

treats the actions of the agents on an individual basis, calling the separate activities "seizures" instead of recognizing that they constitute a search.

Because of the physical entry involved in opening the plastic bags, removing samples and testing the substance, it is clear that these actions constitute a search. See *Cardwell v. Lewis*, 417 U.S. 583, 591-592 (1974). Therefore, this Court's rules regarding warrantless seizures of items upon reasonable suspicion, on probable cause or because they are in plain view are not applicable.

The government nowhere claims that the actions of the agents did not exceed the scope of the prior, private search. Because those actions, involving physical entry of the package and its contents, clearly constituted a search and the agents did not obtain a warrant, the Court of Appeals correctly applied *Walter v. United States, supra*, in determining that the search was unlawful.

ARGUMENT

THE UNLIMITED, WARRANTLESS SEARCH OF A PACKAGE BY FEDERAL AGENTS, WHICH EXCEEDED THE SCOPE OF A PRIOR, PRIVATE SEARCH OF THAT PACKAGE, VIOLATED THE FOURTH AMENDMENT.

INTRODUCTION

The Court of Appeals properly applied the doctrine clarified by this Court in *Walter v. United States*, 447 U.S. 649 (1980) in determining that federal narcotics agents had unlawfully searched the package addressed to Respondents' residence. The use of chemical field-testing is not at issue in this case; rather, it is whether government agents can extend the scope of a private search of a pack-

age without obtaining a warrant, where neither exigency nor any other exception to the warrant requirement of the Fourth Amendment applies.

In section A, we demonstrate that the DEA agents did conduct a search within the purview of the Fourth Amendment when they opened the plastic bags, extracted samples and subjected them to chemical tests, thus exceeding the scope of the prior private search. In section B, we explain that this search, conducted without a warrant, was unlawful.

A. OPENING PLASTIC BAGS, EXTRACTING SAMPLES OF THE SUBSTANCE WITHIN AND CHEMICALLY ANALYZING THAT SUBSTANCE CONSTITUTES A SEARCH.

1. Respondents clearly had a privacy interest protected by the Fourth Amendment in the sealed package that was sent via Federal Express. This Court has long recognized that:

> Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.

Ex parte Jackson, 96 U.S. 727, 733 (1878). Accord *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970); *United States v. Chadwick*, 433 U.S. 1, 10 (1977); *Walter v. United States, supra*, 447 U.S. at 654-55 n. 5.

Even absent such controlling authority, it is clear that Respondents were entitled to the protection of the Fourth Amendment for the package, as they "exhibited an actual (subjective) expectation of privacy and, second, that . . . expectation (was) one that society is prepared to recognize as reasonable." *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *Smith v. Maryland*, 442 U.S. 735, 740 (1979); *United States v. Knotts*, —— U.S. ——, 103 S.Ct. 1081, 1085 (1983). See also *Walter v. United States, supra*, 447 U.S. at 658-659 n. 12; *Texas v. Brown*, —— U.S. ——, 103 S.Ct. 1535, 1542 (1983); *Illinois v. Andreas*, —— U.S. ——, 103 S.Ct. 3319, 3323 (1983).

The absence of labeling on the package, its multi-layered contents and sealed duct-tape tube establish that Respondents took virtually every precaution possible to prevent discovery of the contents of the package. Compare *United States v. Barry*, 673 F. 2d 912, 919 (6th Cir.), cert. den. —— U.S. ——, 103 S.Ct. 238 (1982). It is clear, therefore, that Respondents wished to keep the contents of the package private, as the government repeatedly recognizes. (Pet. Br. at 7, 14, 15, 16 n.8). Equally important is that their privacy interest is determined at the time the package was shipped; therefore, it was not defeated by the fortuitous opening of the package by Federal Express. *Walter v. United States, supra*, 447 U.S. at 658-659 & n. 12.

2a. The fact that the DEA agents were lawfully in

possession of the package did not give them authority to search its contents. An individual's possessory and privacy interests in a sealed package are distinct. Even where government interests in preventing loss or destruction of suspected contraband justify possession of a package, privacy interests in its contents require the government to obtain a warrant authorizing the search of such a closed container. *United States v. Chadwick, supra,* 433 U.S. at 13; *Arkansas v. Sanders,* 442 U.S. 753, 762 (1979); *Robbins v. California,* 453 U.S. 420, 426 (1981); *United States v. Place,* —— U.S. ——, 103 S.Ct. 2637, 2644 (1983).[1] As Chief Justice Burger explained in *Chadwick,*

> Respondents' principal privacy interest in the footlocker was, of course, not in the container itself, which was exposed to public view, but in its contents. A search of the interior was therefore a far greater intrusion into Fourth Amendment values than the impoundment of the footlocker. *Though surely a substantial infringement of respondents' use and possession, the seizure did not diminish respondents' legitimate expectation that the footlocker's contents would remain private.* 433 U.S. at 13-14 n. 8. (Emphasis supplied).

The privacy interest maintained by Respondents here—not only in the contents of the package but additionally in the (illegal) nature of the substance that package contained—is directly analagous to that in any other closed container.

The government seemingly ignores these authorities, focusing instead upon the nature of the information desired

[1]This rule is not affected by the holding in *U.S. v. Ross,* 456 U.S. 798, 824 (1982). *United States v. Place,* — U.S. —, 103 S.Ct. 2637, 2641 n. 3 (1983).

to be kept secret, described as the "molecular structure" of the substance contained within the package. (Pet. Br. at 11). Although recognizing that Respondents understandably *did* expect to keep the nature of the substance private, it is argued that because a chemical analysis will "rarely, if ever, interfere with any interest protected by the Fourth Amendment" and is not "remotely as intrusive as a search of a person's papers or effects" (Pet. Br. at 11, 12), it should not be deemed a search subject to the Fourth Amendment.

The constitutional underpinning for this argument is difficult to discern, as this Court has never recognized that "minor" searches are not subject to the Fourth Amendment but "major" searches are.[9]

Not only is there no prior support for such a *de minimus* rule regarding unlawful searches; to accept such a doctrine would surely render meaningless the protection for "effects" which the specific language of the Fourth Amendment provides, and be directly at odds with the fact that that Amendment "protects people, not places." *Katz v. United States, supra,* 389 U.S. at 351. Further, acceptance of such a doctrine would make it difficult, if not impossible, to establish an identifiable and workable standard

[9]We recognize that such a distinction has been recognized for "minor seizures"—those allowed for limited purposes on less than probable cause. *Terry v. Ohio,* 392 U.S. 1, 30 (1968); *United States v. Place, supra* n.1, 103 S.Ct. at 2644. This distinction is explained by the functional physical difference between a "seizure" (a taking) and a "search" (an entry).

by which police conduct could be judged,[3] and the necessary *post hoc* judgments to determine "how illegal" a particular search was would be necessarily arbitrary. Therefore, without any legal or logical support, the theory should be rejected.

2b. The government's related contention is that because the field test reveals only whether the substance is or is not cocaine, and nothing else about its composition,[4] it is therefore not a search; perforce the Fourth Amendment does not apply. (Pet. Br. at 14-15.) In other words, because the test could reveal only information about unlawful activity, and no information about lawful activity, no "legitimate private interest" (Pet. Br. at 15) was infringed.

Not surprisingly, no authority is cited for this proposition, for there is none. *Illinois v. Andreas, supra,* 103 S.Ct. at 3325 (Brennan, J., dissenting) ("We have, to my knowledge, never held that the physical opening and examination of a container in the possession of an in-

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[3]It is worth noting that the government does not indicate whether an initial negative chemical analysis would permit its agents to extend the scope of the search by a more sophisticated analysis.

Caution should be exercised in denying that government practices constitute a search.

> To say that a particular type of police practice is not a search is to conclude, in effect, that such activities "may be as unreasonable as the police please to make them," and thus the push must be in the direction of applying the "search" appellation to those varieties of police conduct which we are not prepared to leave totally uncontrolled.

I. W. La Fave, "Search and Seizure", §2.2 at 267 (1978).

[4]As the government notes (Pet. Br. at 14 & n. 7) this fact was not developed below but is based upon information from the DEA.

At our request, the government has provided us with the basis for this assertion, which indicates that the test in question is specific for cocaine in comparison with eighteen other substances of similar appearance.

dividual was anything other than a 'search'.").[4] If the government's assertion were correct, neither this Court nor any other would have much occasion to examine the meaning of the Fourth Amendment.[5]

More important, it is not true that no rights of the innocent can be infringed by warrantless searches such as occurred in this case. Although somewhat unlikely, it is certainly possible for an innocent person—whether by reason of mental deficiency, paranoia, eccentricity or any other reason—to be shipping lawful substances such as sugar, talcum powder or baking soda via contract carrier.[6] Although the severity of intrusion by chemical analysis may not be as high as other intrusions, it still constitutes an entry into personal effects—something desired to be kept private, something maintained as secret—and is no less a violation of the security of one's possessions than opening a suitcase, a box marked "Fragile", a purse or any other repository of personal effects.

United States v. Place, supra, also supports the conclusion that the withdrawal and analysis of the substance here constituted a search. The primary issue in *Place* was the permissibility and scope of a limited detention of luggage on reasonable suspicion that it contained narcotics. There, DEA agents detained the defendant's bags on

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[4]Interestingly, the government cites *Cupp v. Murphy*, 412 U.S. 291 (1973) in support of its contention that the chemical analysis here was not a search because it did not intrude upon "cherished personal security". (Pet. Br. at 15). *Cupp v. Murphy* also held that the taking of fingernail scrapings was a search, 412 U.S. at 295, a process which is certainly at least the functional equivalent of taking samples of a substance and subjecting them to chemical analysis. See also *Davis v. Mississippi*, 394 U.S. 721, 727 (1969).

[5]As Justice Douglas so cogently observed, Fourth Amendment rights are difficult to protect because "their advocates are usually criminals." *Draper v. United States*, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting).

[6]Cf. Vol. 9, no. 2 "Drug Enforcement" at 12 (U.S. Department of Justice, Fall, 1982) which cautions federal agents about the sending of cocaine substitutes which contain no controlled substance through the mail.

such a basis and subjected them to a "sniff test" by a trained narcotics detection dog, which led to issuance of a search warrant.

In approving this type of seizure, the Court concluded that the "sniff test" did not constitute a search.

> We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. *A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage.* It does not expose noncontraband items that otherwise would remain hidden from public view as does for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods. *In these respects, the canine sniff is sui generis. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure.* Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment. 103 S. Ct. at 2644-2645. (Emphasis supplied; citation omitted.)

Consideration of the relevant factors here leads to the conclusion that a search was involved:

1. Withdrawal of the sample and its testing *did require* complete entry of the package;

2. Everything in the package *was* exposed to the public view; and

3. The procedure here is more intrusive because it involved physical entry of the package and its contents.

The conclusion that the agents' actions here constituted a search is also mandated by *Walter v. United States, supra*, contrary to the government's contention. (Pet. Br. at 16-17.) It is perhaps true that pornographic films disclose more "information" than does a chemical analysis, but the Fourth Amendment does not protect only "information" within the purview of the First Amendment; its primary protection is the security ("to be secure") of people themselves and in their possessions ("houses, papers and effects").

Thus, the "search of the contents of the films" in *Walter*, 447 U.S. at 654, equates to the extraction and chemical analysis of the contents of the package here. The contents of both containers was apparent (by description or appearance); agents in both cases were attempting to determine whether the owner/recipient was guilty of a crime; and there was probable cause to believe the contents were contraband. Neither procedure could be called anything but a search, and the fact that the materials in *Walter* were arguably protected by the First Amendment required only that the warrant requirement be "scrupulously observed", 447 U.S. at 655 & n.6; it was not determinative of the result.

3. The government's final reason for maintaining that the actions of the agents did not constitute a search involves the "extraordinary burdens" which would result to narcotics enforcement if search warrants were required under situations such as that here. (Pet. Br. at 17-18.)

Law enforcement efficiency, of course, is not a sufficient reason to sacrifice the protection of the Fourth Amendment. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978); *Arkansas v. Sanders, supra*, 442 U.S. at 758. Furthermore, the government's position is demonstrably incorrect.

First, there is no language in the Court of Appeals' opinion supporting the proposition that it "would apparently rule" (Pet. Br. at 18) that every chemical analysis is a search. The opinion makes clear that the only issue is whether the search by the agents exceeded the scope of the search by Federal Express; that is the basis of the holding below. 683 F. 2d at 299, 300.

Second, it is clear that not all field tests or other chemical analyses could reasonably be argued to require a warrant, as several examples show. After a hand-to-hand buy, the seller has relinquished possession, control and ownership of his drugs, and thus his expectation of privacy. After execution of a valid search warrant and seizure of items authorized by that warrant, the testing of substances seized clearly falls within the scope of the warrant. A person who gives consent to examine his belongings which contain illegal substances waives his expectation of privacy and, absent qualification, gives unlimited right to search. Drugs which are seized incident to a lawful arrest may be tested because the fact of arrest subsumes the individual's expectation of privacy. In none of these several instances, and others, is a warrant required; nothing in the Court of Appeals' opinion suggests the contrary.

In this connection, it is appropriate to mention *Illinois v. Andreas, supra*, which held that once the police have lawfully opened a container and identified its contents as being illegal, a subsequent re-opening of the con-

tainer is not a search, absent a substantial likelihood that the contents have been changed. 103 S.Ct. at 3324-3325. The Court reasoned that once the container was *lawfully searched*, the expectation of privacy was lost; "(n)o protected privacy interest remains. . ." 103 S.Ct. at 3323. *Andreas* is instructive in its recognition that examination of the container—opening it and chemically testing its contents—did constitute a search, lawful because of the "border search" exception. See *United States v. Ramsey*, 431 U.S. 606, 619 (1977); *Torres v. Puerto Rico*, 442 U.S. 465, 472-473 (1979).

Thus the government's extravagant reading of the decision below and resulting illogical reasoning suggest absurd results (Pet. Br. at 18)—results far removed from reason and the decision of the Court of Appeals. Therefore, the conclusion that "thousands of additional warrants" (ibid.) will be required each year is simply incorrect. Warrants will be required only where private carriers conducted limited searches of packages without government instigation and government agents wish to exceed the scope of those searches. Although speculative, the paucity of cases on the issue suggest that the problem is not significantly recurrent.[4] Finally, as the facts of this case nicely demonstrate, search warrants are not difficult to obtain. By the time the agents here had re-wrapped the package at the airport and driven to Respondents' residence, a search warrant had already been procured by another agent. (J.A. 10, 17-18, 30.) Requiring warrants under the narrow factual setting here would surely not

[4]Cf. *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978): "(R)eality hardly suggests abuse; and if abuse occurs, there will be time enough to deal with it."

result in any "massive burden" (Pet. Br. at 18) on law enforcement, if indeed any burden at all.

Finally, the government lists a series of cases in which "every other court of appeals has rejected, either expressly or by implication, the view that a chemical analysis requires a warrant." (Pet. Br. at 19.) A brief review of those cases shows that most did not reach the issue of the permissible scope of government searches after private searches and therefore do not bear on the decision here.

United States v. Barry, supra, is the only federal authority we have found in direct conflict with the decision here, although it is also in conflict with this Court's decision in *Walter.* In *Barry,* a damaged package was examined by Federal Express employees, who opened and discovered it to contain four large bottles of methaqualone pills. Because of the large number of pills and effacement of the pharmaceutical numbers, the DEA was notified. Agents removed five pills for testing, and then returned the package to Federal Express. The defendant was arrested when he picked up the package.

The Court of Appeals held that the search (removing the pills for testing) could not be justified by the "plain view" exception to the warrant requirement because two essential elements—exigency and inadvertency—were not present. 673 F.2d at 918. However, the court found that there was no Fourth Amendment violation because Barry had no legitimate expectation of privacy in the contraband at the time of seizure.

> Barry and his supplier . . . could have taken greater precautions to disguise the shipment. They chose not to. Instead, they shipped a large quantity of pills in clear bottles which were plainly labeled Metha-

> qualone. In addition, the prescription numbers on the labels had been effaced. In light of Barry's failure to take precautions to protect his privacy interest from the risk of exposure inherent in his bailment, we find that he had no reasonable expectation of privacy in his drug parcel. 673 F.2d at 919.

One's interest in privacy, of course, is in the contents of a package, as clearly established above. In any event, the case is factually distinguishable, as the cocaine here was contained within four plastic bags, enclosed in duct tape, covered by newspaper and contained within a box which was originally wrapped. The same was not true for the methaqualone.

Barry also found *Walter* distinguishable, stating that

> *Walter* turned on the fact that the material seized was protected by the First Amendment. The chemical testing of Barry's pills was simply not an investigation on the scale required in *Walter* to adjudge the obscenity of the films. It was at most routine. 673 F.2d at 920.

As we observed above, *supra*, p. 15, we disagree with the Sixth Circuit's analysis of *Walter* and submit that any First Amendment considerations existent there were not determinative of this Court's decision.

See also *United States v. Russell*, 655 F. 2d 1261 (D.C. Cir. 1981), modified on other grounds 670 F. 2d 323, cert. den. 457 U.S. 1108 (1982) (warrantless search justified by automobile exception; field test not discussed); *United States v. Jennings*, 653 F. 2d 107 (4th Cir. 1981) (private versus government search; field-testing issue not raised; *Walter* not cited); *United States v. Walther*, 652 F. 2d 788

(9th Cir. 1981) (warrantless search by airline violated Fourth Amendment due to government involvement; cocaine-sampling issue not reached); *United States v. Williams*, 622 F. 2d 830 (5th Cir. 1980) (en banc), cert. den. 449 U.S. 1127 (1981) (validity of arrest and search incident to arrest; field test mentioned only in search warrant affidavit for luggage); *United States v. Andrews*, 618 F. 2d 646 (10th Cir.), cert. den. 449 U.S. 824 (1980) (private versus government search; *Walter* not cited); *United States v. Bulgier*, 618 F. 2d 472 (7th Cir.), cert. den. 449 U.S. 843 (1980) (private versus government search; field-testing issue not raised; *Walter* not cited); *United States v. Nieves*, 609 F. 2d 642 (2nd Cir. 1979) cert. den. 444 U.S. 1085 (1980) (search justified by border search exception; field test issue not reached); *United States v. Edwards*, 602 F. 2d 458 (1st Cir. 1979) (private versus government search; pre-*Walter* decision); *United States v. Rodriguez*, 596 F. 2d 169 (6th Cir. 1979) (plain view; pre-*Walter* decision); *United States v. Belle*, 593 F. 2d 487 (3d Cir.) (en banc), cert. den. 442 U.S. 911 (1979) (validity of arrest and plain view seizure; field-testing issue not raised); *United States v. Crabtree*, 545 F. 2d 884 (4th Cir. 1976) (private versus government search). *United States v. Ford*, 525 F. 2d 1308 (10th Cir. 1975) (private versus government search).

It is also worth noting that the Eighth Circuit does not stand alone in requiring that warrants be obtained before samples are removed and testing conducted on substances located within a container. In *United States v. Taheri*, 648 F.2d 598 (9th Cir. 1981) a DEA agent handled a package which had been damaged in the mail, observing folded paper bindles when the top opened. His removal of a bindle and testing of the brown paper which fell out

without a warrant was held to be unlawful, the court noting that "the government does not seriously dispute the illegality of that search of the package and seizure of the sample." 648 F.2d at 599. In *United States v. Rivera*, 654 F.2d 1048, 1056 (5th Cir. 1981) and *United States v. Johns*, 707 F.2d 1093, 1099 (9th Cir. 1983) the Fifth and Ninth Circuits held that seizure of bags and bales of marijuana from vehicles on probable cause that they contained contraband was lawful, but the sampling and chemical testing of their contents to confirm the presence of the drug required a warrant. In *Cash v. Williams*, 455 F.2d 1227 (6th Cir. 1972), a search by a government agent to confirm that a paper bag held marijuana, after a private person had opened the bag and found a substance he suspected but was unable to identify as marijuana, was held unlawful. The Sixth Circuit reasoned that the private party should be characterized not as if he had handed over evidence, but as an informer; a warrant was therefore required to complete the search for illicit drugs. 455 F.2d at 1230. See also *United States v. Newton*, 510 F. 2d 1149, 1153 (7th Cir. 1975) (field-testing turns private search into government search).

B. THE AGENTS VIOLATED THE FOURTH AMENDMENT BY CONDUCTING A WARRANTLESS SEARCH OF RESPONDENTS' PACKAGE BY OPENING THE PLASTIC BAGS, WITHDRAWING SAMPLES OF THE SUBSTANCE AND SUBJECTING THOSE SAMPLES TO CHEMICAL ANALYSIS.

We have established that Respondents had an expectation of privacy in the package, and therefore the actions of the agents in opening the plastic bags, withdrawing samples and field-testing the substance found within con-

stituted a search. This search can be sustained only if it is within one of the well-recognized exceptions to the requirements that searches be conducted with warrants. "(S)earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States, supra,* 389 U.S. at 357 (ffn. omitted); *Mincey v. Arizona, supra,* 437 U.S. at 390; *United States v. Ross,* 456 U.S. 798, 102 S.Ct. 2157, 2172 (1982). The exceptions to the warrant requirement are "jealously and carefully drawn", *Jones v. United States,* 357 U.S. 493, 499 (1958) and "the burden is on those seeking the exemption to show the need for it." *United States v. Jeffers,* 342 U.S. 48, 51 (1951). Accord *Arkansas v. Sanders, supra,* 442 U.S. at 759-760; *Coolidge v. New Hampshire,* 403 U.S. 443, 455 (1971).

The government apparently ignores these authorities, and disregards that which has been Respondents' position throughout: the government agents exceeded the scope of the prior, private search by opening the plastic bags, removing samples and performing chemical analysis of the contents. Under *Walter v. United States,* their actions were illegal and therefore the Court of Appeals' decision is correct.[9]

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[9]Contrary to the government's interpretation of what Respondents "suggest" (Pet. Br. at 20), these actions, additional to those performed by Federal Express, should be considered collectively. This is clearly the basis for the Court of Appeals' decision:

> (W)e hold the agents were required to obtain a warrant authorizing the taking of samples and analysis thereof. 683 F. 2d at 300. (Fn. omitted).
>
> • • •
>
> We find that the agents' removal of the plastic bags, the taking of samples, and the chemical analysis of these samples constituted a violation of defendants' fourth amendment rights. Ibid.

In *Walter v. United States*, a private carrier delivered twelve, large, sealed packages containing 871 boxes of film to the wrong company. Employees of that company opened the boxes, discovered that they had suggestive drawings on one side and explicit descriptions of the sexual contents on the other, and one employee attempted, unsuccessfully, to view the films by holding them up to the light. The FBI was then contacted, lawfully acquired possession of the boxes of film, and viewed the films with a projector, without obtaining a warrant. The defendants were tried and convicted of obscenity charges after a motion to suppress was denied; a plurality of this Court reversed, finding that

> the unauthorized exhibition of the films constituted an unreasonable invasion of their owner's constitutionally protected interest in privacy. It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances. 447 U.S. at 654.

The Court explained that merely because the FBI lawfully obtained possession of the boxes, it did not necessarily follow that they were given authority to search the contents, since "an officer's authority to possess a package is distinct from his authority to examine its contents." Ibid. (Fn. omitted).

Finally, the Court found unpersuasive the fact that the employees of the private business concern had searched the boxes before the Government instituted any search.

> Nor does the fact that the packages and one or more of the boxes had been opened by a private party before they were acquired by the FBI excuse

> the failure to obtain a search warrant. . . . In this case there was nothing wrongful about the government's acquisition of the packages or its examination of their contents to the extent that they had already been examined by third parties. Since that examination had uncovered the labels, and since the labels established probable cause to believe the films were obscene, the government argues that the limited private search justified an unlimited official search. That argument must fail, whether we view the official search as an expansion of the private search or as an independent search supported by its own probable cause. 447 U.S. at 656."

In other words, a private search does not insulate a official search from the requirements of the Fourth Amendment, whether the latter is deemed an "expansion" of the private search or an "independent search" supported by its own probable cause.

For constitutional purposes, the conduct of the narcotics agents here is indistinguishable from that of the FBI agents in *Walter:* there was a private search of the contents of the package; the agents obtained custody of the package lawfully; but once the agents obtained possession of the package, they executed an unlimited official search, which went beyond the scope of the private search. Since the government nowhere contends that the agents'

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[15]Justice White amplified on this reasoning in his concurring opinion, recognizing that whatever the extent of the prior, private search, the warrant requirement is not obviated. 447 U.S. at 662. (White, J., concurring).

actions were not an expansion of the private search, *Walter* squarely controls.

The government next[11] admits that opening a transparent container to remove a sample *is* a search; they contend that no warrant was required because the bags were transparent. (Pet. Br. at 23.) At the risk of repetition, this case involves the interest of privacy in a package and the permissible scope of a search of that package; therefore the appearance of the plastic bags themselves is not relevant.

In addition, the dicta which the government cites from *Arkansas v. Sanders* refers to containers and packages "found by police during the course of a search. . ." 442 U.S. at 764 n. 13. The agents here were present to search the container itself; thus, this is not the case where justification for a "container search" is provided by a basis for police action (such as a search) independent of the container itself. See *New York v. Belton*, 453 U.S. 454, 460 (1981) (lawful custodial arrest of automobile driver); *United States v. Ross, supra*, 102 S.Ct. at 2170-2171 (automobile search); *Illinois v. Lafayette*, —— U.S. ——, 103 S.Ct. 2605, 2611 (1983) (stationhouse inventory search after lawful arrest).

Next, and further fragmenting the extended search, the government appears to maintain that the plain view doctrine justified the removal, on two occasions, of samples of the substance for testing. By calling the removal and testing of samples "seizures" (Pet. Br. at 24, 25, 26), the

[11]Much verbiage is devoted to what Respondents *do not* dispute nor contend (Pet Br. at 20-22); it is primarily correct and therefore will not be discussed at length here. No "private search" question is presented, *Burdeau v. McDowell*, 252 U.S. 465, 475 (1921), and we do not maintain that it is relevant whether the plastic bags were in plain view when the DEA agents arrived.

government seeks application of a "minimal intrusion" doctrine of Fourth Amendment jurisprudence[11] and argues once again that this process was not a search. (Pet. Br. at 24.)

Respondents have stated repeatedly that the issue here involves the search of the package and that the extended actions by the agents can only be considered as a whole. Despite the fact that only a small amount of substance is involved, its removal and testing is still clearly a search; without such procedures the agents would not have known whether it was really "damp sugar". (J.A. 70). Compare *Cardwell v. Lewis*, 417 U.S. 583, 591-592 (1974) (examination of tire and taking of paint scrapings is a search; automobile exception).

Finally, it is disingenuous at best to suggest that a package which agents have taken from private parties has not *already* been seized, but that complete examination of that package—including chemical testing of its contents—is somehow just *another* seizure. Such a suggestion makes neither practical nor forensic sense.

The government's final argument is that the Fourth Amendment permits "*seizures* upon probable cause without a warrant." (Pet. Br. at 25) (Emphasis supplied). Respondents do not contend otherwise and have never challenged the agents' seizure of the package by taking it into custody. However, as clearly established above, it is the *search* of this package which this case involves, and the plain view doctrine simply has no applicability: the seizure is not contested; there is no prior independent justification for police presence; and there is no inadvertence,

[11]See generally *Terry v. Ohio*, 392 U.S. 1 (1968) (street detention); *Delaware v. Prouse*, 440 U.S. 648 (1979) (auto stop).

as the agents expected to find a package containing contraband when they arrived. See *Texas v. Brown, supra,* 103 S.Ct. at 1540 & n. 4."

CONCLUSION

Respondents respectfully submit that the Court of Appeals has not erred in its application of fundamental Fourth Amendment law, and its decision should be affirmed.

Respectfully submitted,

MARK W. PETERSON
Suite 500 Builders Exchange
609 Second Avenue South
Minneapolis, Minnesota 55402
(612) 339-1431
Attorney for Respondents

"In a final footnote, the government discusses the Court of Appeals' finding that without the chemical analysis of the substance in the package, probable cause for the search of Respondents' residence could not be established. It is suggested that even without the evidence obtained by the challenged search by the agents, probable cause existed. This argument, raised for the first time in this Court, should not be considered. *United States v. Lovasco,* 431 U.S. 783, 788 n. 7 and cases cited (1977); *United States v. Mendenhall,* 446 U.S. 544, 551 n. 5 and cases cited (1980). Cf. *Illinois v. Gates,* — U.S. —, 103 S. Ct. 2317, 2321-2325 (1983).

No. 82-1167

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BRADLEY THOMAS JACOBSEN AND DONNA MARIE JACOBSEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D. C. 20530
(202) 633-2217

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REPLY BRIEF FOR THE UNITED STATES

1. Respondents repeatedly state that the DEA agents "exceeded the scope" of the private search (Resp. Br. 16; see also *id.* at 7, 17, 22, 24-25; Am. Br. 2).[1] It is of course true that the agents took actions that the Federal Express employees had not already taken; but it does not follow that the agents' actions are subject to scrutiny under the Fourth Amendment. "If the inspection by police does not intrude upon a legitimate expectation of privacy, there is no 'search' subject to the Warrant Clause." *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5.

Our central submission is that once a substance has lawfully come into the possession of law enforcement authorities, an analysis of its chemical composition does not invade

[1] "Am. Br." refers to the Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae.

any privacy interest that is entitled to protection. Respondents do not even attempt to explain why a person might have a legitimate interest in keeping the chemical composition of a substance secret.

Indeed, as respondents appear to recognize, an innocent person would "ship[] lawful substances such as sugar, talcum powder or baking soda via contract carrier" only "by reason of mental deficiency, paranoia, eccentricity" or some similar peculiarity (Resp. Br. 13). It would then require a further measure of eccentricity for a person to feel that his privacy was invaded when the authorities, having lawfully come into possession of the substance, discovered that it was indeed talcum powder and not baking soda. The point of the Court's repeated injunction that the Fourth Amendment protects only *reasonable* expectations of privacy is precisely that the Amendment cannot be read to apply to such thoroughly eccentric privacy interests that may, in fact, not be held by anyone.[2]

2. This Court's decisions in *Illinois* v. *Andreas, supra*, and *United States* v. *Place*, No. 81-1617 (June 20, 1983), both issued since our opening brief was filed, further confirm that the DEA agents here did not conduct a search within the meaning of the Fourth Amendment. In *Place*, the

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[2]As we said in our opening brief (U.S. Br. 19), every other court of appeals has either held or assumed that the chemical testing of a substance lawfully in the possession of the authorities is not a search. The cases cited by respondents (Br. 20-21) are not to the contrary. In *United States* v. *Johns*, 707 F.2d 1093 (9th Cir. 1983), *United States* v. *Rivera*, 654 F.2d 1048 (5th Cir. 1981), and *United States* v. *Taheri*, 648 F.2d 598 (9th Cir. 1981), the courts held the opening of containers to be an illegal search; they did not suggest that subsequent testing was an additional search. In *United States* v. *Newton*, 510 F.2d 1149 (7th Cir. 1975), the issue was whether government agents were so far implicated in the private opening of a suitcase as to make the action a government search; far from suggesting that subsequent chemical testing of a substance found in the suitcase might be another search, the court appeared to assume that it was not. *Cash* v. *Williams*, 455 F.2d 1227 (6th Cir. 1972), did not involve a chemical analysis at all.

Court ruled that a sniff by a trained narcotics dog is not a search because it is "limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure" (slip op. 11). Like a dog sniff, a chemical analysis "tells the authorities something about the contents of" a container, but "the information obtained is limited" (*ibid.*). Indeed, as we explained in our opening brief (U.S. Br. 14-16), the field test at issue here, exactly like a dog sniff,"disclose[d] only the presence or absence of narcotics, a contraband item" (*Place*, slip op. 10-11).

It is true that a chemical analysis, unlike a dog sniff, can generally be conducted only after the container holding the suspicious substance has been opened. But here the initial opening of the package — the intrusion that revealed the suspicious powder inside a transparent container — was conducted, as respondents concede, by private parties. This intrusion into the package therefore did not violate the Fourth Amendment. See also *Illinois* v. *Andreas*, slip op. 3 n. 1 ("Common carriers have a common law right to inspect packages they accept for shipment, based on their duty to refrain from carrying contraband.").[3] The agents then opened the transparent container and removed a few particles of the suspicious substance. Even if this action constituted a seizure—and we believe it did not (see U.S. Br. 24-25)—it is abundantly clear that removing such items from inside a transparent container does not violate the Fourth Amendment (*Illinois* v. *Andreas*, slip op. 6; citations omitted):

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[3]After our opening brief was filed, a former Federal Express employee told a DEA agent that Federal Express employees made false statements under oath at the suppression hearing and the trial in this case. When we learned this information, we promptly relayed it to respondents' counsel and sent him a copy of the DEA agent's report. We are also lodging a copy of that report with the Court.

The former employee alleged that Federal Express employees opened the package containing cocaine not because it was damaged in shipment but because they were suspicious of it. Even if this allegation were true,

> The plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer whose access to the object has some prior Fourth Amendment justification and who has probable cause to suspect that the item is connected with criminal activity. The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost * * *.

Respondents' contention that the agents' actions constituted a search within the meaning of the Fourth Amendment is, therefore, insubstantial.

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it would in no way affect the issue before this Court. The former Federal Express employee did not allege, and respondents have never contended, that the government was involved in the Federal Express search. Under *Burdeau* v. *McDowell*, 256 U.S. 465 (1921), a purely private search does not implicate the Fourth Amendment even if it is tortious. See also *Illinois* v. *Andreas*, slip op. 3-4 n.2 ("When common carriers discover contraband in packages entrusted to their care, it is routine for them to notify the appropriate authorities. The arrival of police on the scene to confirm the presence of contraband and to determine what to do with it does not convert the private search by the carrier into a government search subject to the Fourth Amendment."). And the former employee's allegations, assuming they are true, would not even establish that the private search was tortious. See *Illinois* v. *Andreas*, slip op. 3 n.1.

The former employee did not suggest that the government was in any way aware that Federal Express employees were testifying falsely. In addition, we would note that some of the circumstances recounted in the agent's report cast doubt on the credibility of the former employee's statements. While respondents are free to raise any issues relating to these allegations on remand, there is no reason for the allegations to deflect this Court from considering the question on which it granted certiorari; that question obviously has practical implications for law enforcement that far transcend this particular case.

For these reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

NOVEMBER 1983

DOJ-1983-11

No. 82-1167

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER AND BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION, THE LEGAL FOUNDATION OF AMERICA, AND THE MINNESOTA CHIEFS OF POLICE ASSOCIATION IN SUPPORT OF PETITIONER

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611
WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco,
California 94080
JAMES P. MANAK, ESQ.
General Counsel
Americans for Effective
Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602
Counsel for Amici Curiae

(Additional Counsel Listed on Inside Cover)

Pandick Press Midwest, Inc., Chicago • 454-7600

Of Counsel:

HOWARD G. BERRINGER
Assistant Executive Director
Americans for Effective
Law Enforcement, Inc.
South San Francisco,
California 94080

DAVID CRUMP, ESQ.
Professor of Law
South Texas College of Law
Houston, Texas 77002

DONALD FLUSGEL, ESQ.
General Counsel
Minnesota Chiefs of Police
Association
Hastings, Minnesota 55033

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60601

WILLIAM B. RANDALL, ESQ.
Doherty, Rumble and Butler
Past President
National District Attorneys
Association
St. Paul, Minnesota 55101

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland 20878

EVELLE J. YOUNGER, ESQ.
Buchalter, Nemer, Fields,
Christie and Younger
Chairman of the Board
Americans for Effective
Law Enforcement, Inc.
Los Angeles, California 90017

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF PETITIONER

Americans for Effective Law Enforcement, Inc., joined by the International Association of Chiefs of Police, Inc., the International Narcotic Enforcement Officers Association, the Legal Foundation of America, and the Minnesota Chiefs of Police Association, respectfully move this Court for leave to file a brief, *amici curiae,* in support of the petitioner in this case.

This motion is made pursuant to Rule 36.3 of the Supreme Court Rules. Consent to file has been granted by Hon. Rex E. Lee, Solicitor General, United States Department of Justice, Counsel for Petitioner, and refused by Mark W. Peterson, Attorney-at-Law, Minneapolis, Minnesota, Counsel for Respondents; consequently we are moving this Court directly for leave to file. Letters of Counsel have been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF AMICI CURIAE AND OUR REASONS FOR DESIRING TO FILE IN THE INSTANT CASE.

I. INTEREST OF THE AMICI CURIAE

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operations of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* fifty-two times in the Supreme Court of the United States, and thirty-three times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 75 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

THE INTERNATIONAL NARCOTIC ENFORCEMENT OFFICERS ASSOCIATION is a service organization of peace officers and related personnel from around the world engaged in narcotic law enforcement. Its goals include the enhancement of the professional performance of its members that will more effectively carry out the proper concerns of government in the eradication of the drug problem afflicting our society, in a manner consistent with the preservation of constitutionally protected liberties. The Association has more than 7,500 members in 76 countries and publishes a monthly magazine called "International Drug Report."

THE LEGAL FOUNDATION OF AMERICA is a nonprofit corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational criminal justice system, in which adjudications of guilt or innocence are reliable rather than haphazard. The Foundation's attorneys have previously appeared as *amicus curiae* in this Court to urge this view. All litigation undertaken by the Foundation is approved by its Board of Trustees, the majority of whom are attorneys. The Foundation does not accept private fees and is supported by grants from the public.

THE MINNESOTA CHIEFS OF POLICE ASSOCIATION, is a not-for-profit Minnesota association and consists of over 300 members who are Minnesota police chiefs and senior law enforcement executives. It seeks to represent in our courts the concern of police administrators with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their efforts to protect public safety.

II. REASONS FOR DESIRING TO FILE A BRIEF AMICI CURIAE IN THE INSTANT CASE.

Amici's interest in the instant case arises from the compelling constitutional and policy questions pertaining to the routine functions of narcotic law enforcement officers at all levels as they relate to field testing of suspicious substances and as they may be adversely affected by the decision and opinion of the court below reported as *United States* v. *Jacobsen,* 683 F. 2d 296 (8th Cir. 1982). The Court in *Jacobsen* held that a federal Drug Enforcement Agent violated the Fourth Amendment when, after being apprised that a private freight carrier had opened a suspicious package and visually inspected a white powder found inside, the agent, acting without a warrant, performed a non-intrusive chemical field test upon the powder that revealed that the powder was cocaine.

Amici believe that the ruling of the court below is a wholly unwarranted extention of the principles embodied in the Fourth Amendment. The ruling is also an example of the confusion and uncertainty that exist in law enforcement circles as a result of this Court's decision in *Walter* v. *United States*, 447 U. S. 649 (1980), and we respectfully ask that that decision be reversed or limited to its facts.

Amici will point out in its brief that routine field tests performed by law enforcement officers to determine the chemical nature of suspected substances that have properly come into their view or possession do not constitute a search under the Fourth Amendment. Such tests are quick and perfunctory; in most cases requiring no movement of the suspected substance. Standard operating procedures developed by law enforcement agencies for the conduct of such tests are unobtrusive and invade no constitutionally protected privacy interests of a defendant. *Amici* will request this Court to recognize such tests as appropriate investigative procedures and to exempt them from the operation of the Fourth Amendment. The inability of law enforcement agencies to perform such tests as indicated raises the possibility that in some cases contraband and dangerous substances may go undetected by the authorities. *Amici* believe that our unique perspective as law enforcement professional organizations, with our constituency of thousands of working investigative officers and executives, will aid the Court in resolving the legal and policy issues in this case.

We, therefore, respectfully move the Court for leave to file as *amici curiae* in this case.

Respectfully submitted,

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611
WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco,
California 94080

JAMES P. MANAK, ESQ.
General Counsel
Americans for Effective
Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602
Counsel for Amici Curiae

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INTEREST OF THE AMICI CURIAE

Our interest has been set forth above at page iv in our motion to file this brief as *amici curiae.*

SUMMARY OF ARGUMENT

Routine field tests performed by law enforcement officers to determine the chemical nature of suspected substances that have properly come into their view or possession do not constitute a search under the Fourth Amendment. Such tests are quick and perfunctory; in most cases requiring no movement of the suspected substance. Standard operating procedures developed by law enforcement agencies for the conduct of such tests are unobtrusive and invade no constitutionally protected privacy interests of a defendant. *Amici* request this Court to recognize such tests as appropriate investigative procedures and to exempt them from the operation of the Fourth Amendment. The inability of law enforcement agencies to perform such tests as indicated raises the possibility that in some cases contraband and dangerous substances may go undetected by the authorities.

ARGUMENT

A CHEMICAL FIELD TEST TO DETERMINE WHETHER A SUSPICIOUS SUBSTANCE THAT HAS PROPERLY COME INTO THE HANDS OF LAW ENFORCEMENT OFFICERS IS CONTRABAND, DOES NOT INVADE A CONSTITUTIONALLY PROTECTED PRIVACY INTEREST AND DOES NOT CONSTITUTE A SEARCH UNDER THE FOURTH AMENDMENT.

AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. has been privileged to file, as noted, many *amicus curiae* briefs with this Court. In many of them, as in the present one, it has been joined by the INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., and other national and state law enforcement groups. Those briefs have usually presented an analysis of the relevant case law and offered suggestions to the Court for decisions that would aid rather than unduly hinder effective law enforcement, while at the same time not impinge upon basic constitutional protections. In the present brief, for reasons that follow, we are dispensing with an extended analysis of the case law. We confine our brief basically to a suggested resolution of the important policy issue involved in this case as it pertains to the serious problem of narcotic law enforcement in this country.

Amici believe that the facts of this case, as revealed in the record, and in the opinion of the court below, fully support a conclusion that the law enforcement conduct, up to the point of confronting the substance in question, did not exceed the scope of the private search, and therefore, under the doctrine of *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971) and *Burdeau* v. *McDowell,* 256 U. S. 465 (1921), the acquisition of the suspicious substance did not violate the Fourth Amendment. The court below, however, relying upon *Walter* v. *United States,* 447 U. S. 649 (1980), has taken the position that the activity of the federal agents was a significant extension of the private search because it revealed the composition of the

powder. It is apparently the view of the court below that placing a drop of chemical upon suspicious powder is constitutionally equivalent to taking a reel of film, setting up a screen and projector, and viewing the film.

Amici note that the decision in *Walter* was based upon a plurality opinion. It is arguable that the Court's decision in that case was based solely upon the Fourth Amendment, because the governmental scrutiny went beyond the scope of the private search at the time when the federal agents screened the films that had been discovered by the private carrier. It is more likely that the five Justices who agreed upon the result in *Walter* did so on the ground that First Amendment rights of the defendant were implicated by the screening of the films suspected of containing pornographic subject matter. Other courts have reached the same conclusion. For example, in *United States* v. *Barry*, 673 F. 2d 912 (6th Cir. 1982), the court distinguished *Walter* on the grounds that the films in *Walter* were protected by the First Amendment and that the chemical field testing involved in *Barry* was not as significant an investigation as the viewing of films. Also, additional cases have had no difficulty in reaching the conclusion that chemical field testing is so unobtrusive as to obviate an extension of the Fourth Amendment probable cause or warrant requirements —— *e.g.*, *People* v. *Adler*, 50 N. Y. 2d 730, 409 N. E. 2d 888, *cert. den.*, 449 U. S. 1014 (1980); *United States* v. *Andrews*, 618 F. 2d 646 (10th Cir.), *cert. den.*, 449 U. S. 824 (1980).

Amici submit that this Court should either overrule *Walter* as wrongly decided, or make clear that it is based upon the interplay of the First and the Fourth Amendments, and thereby confine its precedential value to its unique set of facts. Until such decisive action is taken, state and federal courts will continue to be plagued by problems in applying *Walter* to private searches leading to the turnover of evidence to law enforcement agencies, especially in cases that do not involve materials protected by the First Amendment.

We submit, however, that this Court can end the inquiry most directly by an application of common sense in concluding that the field test of the suspicious material was simply not a search. Such a test is no more than a sensory enhancement procedure that reveals to the trained law enforcement officer the exact chemical nature, and, therefore, criminal nature, if any, of the questioned substance. As this Court noted in *United States* v. *Knotts*, ____ U. S. ____, ____, 103 S. Ct. 1081, 1086, 51 LW 4232, 4234, 32 CrL 3069, 3071 (1983), "[n]othing in the Fourth Amendment prohibit[s] the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case", referring to the so-called "bumper-beeper" attached to the defendant's vehicle for tracking purposes.

As noted by the court in the previously discussed case of *United States* v. *Barry*, 673 F. 2d 912, 920, which involved facts similar to those in the instant case, chemical field tests of suspicious substances are not only "routine", but actually "perfunctory." The court in *People* v. *Adler*, 50 N. Y. 730, 737, 409 N. E. 2d 888, 891, n. 4, correctly stated that "[un]less we are prepared to hold that there is a reasonably [sic] and justifiable expectation of privacy in the contents of a pill capsule, it cannot be said that an intrusion into privacy interests was effected by scientifically examining the drugs."

Describing similar methods used in the laboratory, the authors of SCIENTIFIC EVIDENCE IN CRIMINAL CASES (Foundation Press, Mineola, N.Y., Second Edition, 1978), by Moenssens and Inbau, at p. 288, state that, "[t]hese tests involve the treatment of the suspect sample with a chemical reagent and a notation of reactions such as color change, etc." Such a test can be accomplished simply by dropping a small quantity of chemical on the substance and observing its change of color. To the trained law enforcement officer, the change of color, or other reaction, may reveal the narcotic nature of the

substance. For example, by treating a substance suspected of being cocaine with platinum chloride, if feathery, pale-yellow crystals appear, the trained law enforcement officer would know that the substance is cocaine. Similarly, gold chloride applied to cocaine would produce long, rod-like crystals with short arms extending at right angles. "Colorwise, cobalt thiocynate produces a blue flaky precipitate [when applied to cocaine]." Moenssens and Inbau, SCIENTIFIC EVIDENCE IN CRIMINAL CASES, *supra*, at p. 325. It is important to note for Fourth Amendment purposes, that field tests typically involve no sniffing or tasting of the suspected substance, no lengthy detention of the substance, and, moreover, it need not be picked up or moved from the place where it is found or obtained by the law enforcement officer.

The following procedures for conducting such tests have been prepared by the United States Department of Justice, Drug Enforcement Administration (DEA), North Central Regional Laboratory. They demonstrate the relative simplicity of such tests and their unobtrusive character.

> Chemical field tests are qualitative examinations which give valuable clues as to the identity of samples. The field tests listed below are easy to perform and not too time consuming. They are, however only precursory and presumptive. False positives can be obtained with all field tests. Any drugs which will be used as evidence must be positively identified by a qualified chemist. Additionally, a negative test does not preclude the possibility of another federally controlled drug being present.
>
> *CAUTION:* Law enforcement personnel should take extreme care in handling samples. Do not taste or sniff drugs. Wash hands thoroughly after handling samples. Do not place hands in or on mouth prior to washing hands.

* * *

Examples:

AMPHETAMINES

Test Materials:

Marquis Reagent.

Test Procedure: Add a few drops of the Marquis reagent to a small portion of the powder or crushed tablet or capsule material.

Color Reactions:

Amphetamines react with the reagent to give a red-orange color, turning reddish-brown and then dark brown within one or two minutes.

The reagent gives this characteristic color reaction when applied to white, pink, yellow, or green amphetamine tablets. The red-orange color forms immediately on some tablets while with others it appears in 10 or 20 seconds. Therefore, the critical period of color differentiation for amphetamines is within the first 20 seconds.

Other non-controlled substances chemically similar to amphetamines will also react with Marquis to give an orange color turning to brown.

Mescaline will turn orange-red, and the color remains.

COCAINE, DEMEROL, METHADONE, HEROIN, AND PCP

Test Materials:

Acid Cobalt Thiocyanate Reagent—Dissolve 1 gram of Cobalt Acetate, Nitrate or Chloride and 1.5 gms of Potassium Thiocyanate in 90 ml water and 10 ml acetic acid (glacial).

Color Reaction:

PCP—Blue-green specks within the pink solution
Cocaine, Demerol, Methadone, and Heroin—intense blue flaky precipitate which remains after swirling.

NOTE: Many substances will give a blue colored solution but not the flaky precipitate. Some substances such as methapyrilene and quinine will give a blue precipitate which disappears after swirling the spot plate.

Training Bulletin, United States Department of Justice, Drug Enforcement Administration (DEA), North Central Regional Laboratory, 610 South Canal Street, Chicago, Illinois.

A large number of specific field tests have been developed by the DEA and private testing laboratories for a wide range of controlled substances. The chart appearing on page 9 summarizes such tests and their results.

Amici submit that common sense dictates that the procedure involved in the instant case is truly *de minimis* and not deserving of Fourth Amendment protection. It is a necessary investigative procedure, without which probable cause to believe that the substance is contraband would be impossible to obtain. Without such tests law enforcement officers would be compelled to abandon any further investigation of the suspicious substance. No mechanism for judicial authorization to conduct such a test exists, as might be suggested by *Davis* v. *Mississippi*, 394 U. S. 721 (1969), nor should such authorization be required if the procedure is not a search within the purview of the Fourth Amendment.*

* Requiring law enforcement officers to obtain judicial authorization to conduct field tests would, in many cases, mean that the premises would have to be secured until a magistrate could be found to issue such authorization. In effect, this securing of the scene —during which no one would be allowed to leave the premises —would pose a greater inconvenience and a real invasion of the right to privacy of the occupants of such premises, as compared to an immediate and unobtrusive field test as described in this brief.

UNITED STATES DEPARTMENT OF JUSTICE
DRUG ENFORCEMENT ADMINISTRATION
1800 DIRKSEN FEDERAL BUILDING
219 S. DEARBORN STREET
CHICAGO, ILLINOIS 60604

SUMMARY OF CHEMICAL DRUG TESTS

MATERIAL	REAGENT*	COLOR REACTION
Amphetamine	Marquis	Dark Orange-Brown
Aspirin	Marquis	Light Strawberry Pink
Barbiturates	Dille-Koppanyi	Light Blue-Violet
Caffeine	Marquis	Brown, on standing
Cocaine	Cobalt Thiocyanate	Blue Flakes or precipitate
Codeine	Marquis	Violet to Blue
Darvon	Marquis	Blood Red-Purple
Demerol	Cobalt Thiocyanate	Blue Flakes
Dilaudid	Marquis	Purple
Hashish	Duquenois	Violet
Heroin - White -	Marquis	Purple
Brown -	"	Purple
Brown	Meckes, modified	Green
Lactose	Marquis	None (White Swirl)
Lidocaine	Cobalt Thiocyanate	Blue Solution, no solids
LSD	Erlichs	Blue-Purple
Manitol	Marquis	None
Marihuana	Duquenois	Violet
Mescaline	Marquis	Orange-Red
Methadone	Cobalt Thiocyanate	Blue Flakes
Morphine	Marquis	Purple
Opium	Marquis	Purple
PCP (Phencyclidine)	Cobalt Thiocyanate	Blue Specks
Procaine	Cobalt Thiocyanate	Blue Solution, no solids
Quinine	Marquis	Light Yellow
Tea	Duquenois	None; Chloroform Layer
THC	Duquenois	Blue-Violet
Tobacco	Duquenois	None; Chloroform Layer

* Field Test Kits are manufactured by several companies in various forms. Those being used are the "NIK" brand produced by: Becton, Dickinson, and Company, Public Safety Division, 1912 E. Randol Mill Road, Arlington, Texas, 76011.

Cobalt Thiocyanate	-	NIK Test G (Scott Test)
Dille-Koppanyi	-	NIK Test C
Duquenois	-	NIK Test E
Erlichs	-	NIK Test D
Marquis	-	NIK Test A
Meckes	-	NIK Test K
Meckes, modified	-	NIK Test L

The consequences of prohibiting law enforcement officers from conducting chemical field tests immediately could be devastating where it is suspected that the substance might also be dangerous. We should not so strain the application of the Fourth Amendment as to require law enforcement officers to turn their backs on suspicious substances that might be of an explosive or otherwise endangering nature, such as leaking barrels of what could be toxic chemicals spilling on a highway as a result of an accident. Nor should the police have to turn their backs from a latent substance suspected of being a narcotic under circumstances similar to those that prevailed in the instant case. We ask this Court to exempt such routine, but necessary, investigative processes from the reach of the Fourth Amendment.

CONCLUSION

Amici respectfully submit that the decision of the United States Court of Appeals. Eighth Circuit, should be reversed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

FRED E. INBAU, ESQ.
John Henry Wigmore
Professor of Law Emeritus
Northwestern University
School of Law
Chicago, Illinois 60611
WAYNE W. SCHMIDT, ESQ.
Executive Director
Americans for Effective
Law Enforcement, Inc.
501 Grandview Drive
Suite 209
South San Francisco,
California 94080
JAMES P. MANAK, ESQ.
General Counsel
Americans for Effective
Law Enforcement, Inc.
33 North LaSalle Street
Suite 2108
Chicago, Illinois 60602
Counsel for Amici Curiae
(Additional Counsel Listed on Following Page)

Of Counsel:

HOWARD G. BERRINGER
Assistant Executive Director
Americans for Effective
Law Enforcement, Inc.
South San Francisco,
California 94080

DAVID CRUMP, ESQ.
Professor of Law
South Texas College of Law
Houston, Texas 77002

DONALD FLUEGEL, ESQ.
General Counsel
Minnesota Chiefs of Police
Association
Hastings, Minnesota 55033

DANIEL B. HALES, ESQ.
Peterson, Ross, Schloerb
and Seidel
President
Americans for Effective
Law Enforcement, Inc.
Chicago, Illinois 60601

WILLIAM B. RANDALL, ESQ.
Doherty, Rumble and Butler
Past President
National District Attorneys
Association
St. Paul, Minnesota 55101

WILLIAM C. SUMMERS, ESQ.
Supervising Attorney
International Association of
Chiefs of Police, Inc.
13 Firstfield Road
Gaithersburg, Maryland 20878

EVELLE J. YOUNGER, ESQ.
Buchalter, Nemer, Fields,
Christie and Younger
Chairman of the Board
Americans for Effective
Law Enforcement, Inc.
Los Angeles, California 90017

No. 82-1167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

vs.

BRADLEY THOMAS JACOBSEN and
DONNA MARIE JACOBSEN
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

JOHN KENNETH ZWERLING,
ESQUIRE
ZWERLING and MARK, P.C.
Attorneys and Counselors at Law
108 North Columbus Street
P.O. Box 1929
Alexandria, Virginia 22313
(703) 836-5551

Attorney for Amicus Curiae

DAVID C. LARSON, ESQUIRE
2223 Wittington Blvd.
Alexandria, Virginia 22308
(703) 360-8357
(On Brief)

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers is a District of Columbia non-profit corporation with a membership comprised of more than 2700 lawyers, including representatives of every state. *Amicus* was founded 25 years ago to promote study and research in the field of Criminal Defense Law, to disseminate and advance the knowledge of the law in the field of Criminal Defense Practice and to encourage the integrity, independence and expertise of the defense lawyer. Among N.A.C.D.L.'s stated objectives is the promotion of proper administration of criminal justice. N.A.C.D.L. consequently concerns itself with the protection of individual rights in the improvement of the criminal law, its practices and procedures.

SUMMARY OF ARGUMENT

Unless some exigency or other exception to the warrant requirement exists, law enforcement agents must obtain a warrant before conducting a field test upon a bag of unidentified white powder. The standard operating procedure utilized by the police in conducting the field test here went beyond the scope of the examination for damaged goods by the common carrier, and included opening the bag, seizing some of the contents and destroying the seized contents by chemical analysis. *Amicus* asks the Court to recognize that such tests intrude upon protected Fourth Amendment interests and may not, therefore, be used upon unidentified substances without conforming to the Fourth Amendment's warrant requirement.

ARGUMENT

I

GOVERNMENT PARTICIPATION IN AN OTHERWISE PRIVATE SEARCH THAT EXCEEDS THE SCOPE OF THAT SEARCH MUST COMPLY WITH FOURTH AMENDMENT CRITERIA

Since 1921, the law has been clear that the fruits of a private search are not protected by the Fourth Amendment to the Constitution. *Burdeau* v. *McDowell*, 256 U.S. 465 (1921). However, an inspection and examination by government agents of protected areas that begins where a private search leaves off does invoke the scrutiny of the Fourth Amendment. To the extent that this additional activity constitutes a "search" or "seizure" within the meaning of the Fourth Amendment, it must be subject to the same rigorous Constitutional standards as a search initiated by government agents. To hold otherwise would erase the bright line which currently guides government agents, and would create yet another legal quagmire which requires case by case analysis of how deeply the Government can invade the private domain after an initial intrusion by a private party failed to satisfy the needs or curiosity of law enforcement officials. In addition to creating a murky area where the waters are now clear, the opportunities for abuse and subterfuge are manifest.

II

THE ACTIONS OF THE DEA AGENTS EXCEEDED THOSE OF THE FEDERAL EXPRESS EMPLOYEES AND CONSTITUTED A SEIZURE AND SEARCH

Amicus believes that the law enforcement agents exceeded the scope of the private search. Although the agents initially retraced the steps taken by the private parties by removing the plastic bags from the package, they did not stop there. The agents proceeded to open up the plastic bags, seize some of the contents, and then destroy a portion of the contents by subjecting it to chemical analysis. The entire process had no purpose other than to discover information which was otherwise secreted or hidden from public knowledge. The Court of Appeals for the Sixth Circuit in *United States* v. *Rodriquez,* 596 F.2d 169, 175 (6th Cir. 1979) found similar actions by government agents to be a search.

Support for the proposition that the field test was a search can also be found in those cases that discuss the use of mechanical and electronic aids to the police in the Fourth Amendment context. For instance, the use of magnetometers at airports has been called a search, justified without a warrant for reasons not relevant to this case, even though they can tell nothing about the inside of a person's luggage except that it consists of something metallic. *United States* v. *Epperson,* 454 F.2d 769 (4th Cir.), *cert. denied,* 406 U.S. 947 (1972). Likewise, the use of an X-ray machine which reveals nothing more than the shape, size, and density of an item within a container has also been held to be a search. *United States* v. *Albarado,* 495 F.2d 799 (2nd Cir. 1974). Even the use of ultraviolet light to reveal the presence of fluorescent powder on a suspect's hand has been recognized as a search. *United States* v. *Kenaan,* 496 F.2d 181, 182 (1st Cir. 1974). All of these devices are less intrusive than the chemical analysis involved in a field test since none requires the opening of a container or a physical seizure and destruction of any property.

Not all aids to the police will make an examination of property a search. The Court recently declared that the use of a dog to sniff the exterior of a suspect container to detect the presence of drugs within was not a search within the meaning of the Fourth Amendment. *United States* v. *Place*, ____U.S.____, 103 S.Ct ____, 77 L.Ed.2d 110, 121 (1983). The Court relied on the fact that the dog does not invade the suspect's property, he simply detects those odors that emanate into the public domain. Likewise, the use of a "beeper" to track an automobile is not a search. *United States* v. *Knotts*, ____U.S.____, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). Like the dog, this device invades nothing. It simply performs electronically the task of noting the whereabouts of an automobile that any member of the public could perform. Chemical tests, however, do far more than merely extend the natural senses of the agents. The chemical composition of a substance is totally hidden from public knowledge and cannot be determined by an individual's natural senses. The chemical reactive process is used to unlock its secret composition and must be acknowledged as a search.

III

RESPONDENTS HAD A REASONABLE EXPECTATION OF PRIVACY IN THE PACKAGE AND IN THE IDENTITY OF ITS CONTENTS THAT WAS NOT EXTINGUISHED BY THE PRIVATE SEARCH CONDUCTED BY THE FEDERAL EXPRESS EMPLOYEE

Not every search by government agents is subject to Fourth Amendment scrutiny. In the 1967 landmark decision, *Katz* v. *United States*, 389 U.S. 347 (1967), this Court rejected the traditional physical barrier as a determinent of what areas of privacy are protected by the Fourth Amendment. Thereafter, the Fourth Amendment has been applied to those searches that invaded areas in which a person had a reasonable expectation of privacy. Such an expectation must be an actual one as well as one that society is prepared to recognize. *Smith* v. *Maryland*, 442 U.S. 735 (1979).

There can be no doubt that the sender of the package in this case and Respondents expected the contents of the package to remain free from public observation when it was placed in the hands of the common carrier. Moreover, the fact that the package was apparently damaged and then inspected to determine the extent of the damage did not wholly extinguish that expectation. Respondents had every right to expect, and society should so recognize, that the police would not be called upon to perform a more intrusive examination of their property than that conducted by the common carrier. This includes subjecting it to chemical analysis.[1]

The validity of this expectation was recognized in *Walter* v. *United States*, 447 U.S. 649 (1980). In *Walter*, examination by government agents of films which were within containers that were labeled with a description of their contents was held to be a search. Respondents placed no labels on their plastic bags and, in fact, did nothing to distinguish this white powder from any other white powder. Nor did they otherwise expose the contents of the package or powder to public scrutiny. Under these circumstances, Respondents' expectation of privacy was certainly reasonable.

Citizens living under our Constitutional government should be able to expect that the contents of a securely bound package containing an outwardly nondescript substance placed with a commercial mail carrier will remain private and free from police seizures or searches absent a warrant based upon probable cause or an authorized exception to the warrant

[1] The government asserts that the field test was incapable of revealing any information about an innocent substance, but was only capable of disclosing whether the substance was, in fact, cocaine. Petitioner's Brief at p. 14, n. 7. From this premise, the government bases its entire argument that the Respondents had no expectation of privacy in the contents of the bags. However, the government's assertion is without any factual basis and relies wholly upon an undated, DEA internal memorandum, the accuracy of which has never been scrutinized. This memorandum is not a part of the record in this case. This Court should not decide important Constitutional issues based upon facts not introduced into evidence or tested by the adversarial process.

requirement. If the circumstances of Respondents' case suggested to DEA agents that the package contained an illegal drug, and not an innocent substance, then the government should have detained the package long enough to seek a warrant to search it further.

As Justice Brandeis noted in *Olmstead* v. *United States*, 277 U.S. 438 (1928), the Fourth Amendment confers the right to be let alone which implies the right not to have one's repose and possessions disturbed. In Respondents' case, the police opened up the plastic bags and seized a portion of its contents. This invasion violated the security of Respondents' property and should be scrutinized by Fourth Amendment standards. In addition, the testing destroyed an unknown amount of Respondents' property, the value of which was totally unknown to the government.

IV

THE WARRANTLESS SEIZURE OR SEARCH OF THE SUBSTANCE BY THE DEA AGENTS DID NOT FALL WITHIN ANY RECOGNIZED EXCEPTION TO THE WARRANT REQUIREMENT

If the actions of the police constituted either a seizure or a search of an area in which Respondents had a reasonable expectation of privacy, then those actions were unlawful unless they fell within one of the familiar exceptions to the warrant requirement.

Clearly, there were no "exigent" circumstances to justify a warrantless search, nor does the Government claim any. There is no evidence that "time was of the essence", or that a simple detention of the package pending the issuance of a warrant would have frustrated law enforcement objectives, even if, prior to the field test, probable cause were present.[2]

[2] The government agents could have used the less intrusive "canine sniff" to develop probable cause. *See United States* v. *Place*, ____ U.S. ____, 103 S. Ct. ____, 77 L.Ed.2d 110, 121 (1983).

The rationale set forth in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), and *Texas* v. *Brown*, ____U.S.____, 103 S.Ct. ____, 75 L.Ed.2d 502 (1983), does not support a finding of plain view under the facts of this case. Here, the incriminating nature of the substance was not immediately apparent either from the powder itself, or the packaging, which is why the police needed to conduct the field test.[3] It was, to the observer, a non-descript white powder packaged as any powder-like substance might be for delivery through the mails. Unlike the balloons in *Texas* v. *Brown*, there was no evidence that the packaging of the powder substance in this case was a distinctive characteristic of the manner in which narcotics are commonly packaged.

Furthermore, the discovery of the chemical composition of the substance was not inadvertent, but intentional. The agents obviously suspected that the substance was cocaine, and accordingly, tested specifically for that substance.

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[3] This case is readily distinguishable from the facts in *United States* v. *Rodriguez*, *supra*. There, the carrier had observed the sender to "appear nervous", hesitate when asked to note the contents of the package on the freight bill, and be "emphatic" that the package be held at the Detroit office for pick-up. In addition, neither the address of the sender nor addressee could be confirmed. In the instant case, at the time of the field test nothing was known about the sender, his habits or movements, nor those of the addressee. Further, in *Rodriguez*, the Defendant had listed the contents of the package as "film equipment" which was belied by the carrier when the package was held up and shaken. Thus, when the *Rodriguez* package was opened, revealing its contents, bags of brown powder covered with talcum, it was apparent not only that the sender had lied, which made his actions even more incriminating, but that he had used a substance commonly used by drug shippers to deceive detector dogs as well as the police. These factors led the Court to conclude that the nature of the substance as contraband was immediately apparent. In the case at bar none of these elements were present only an innocuous white powder. To hold that this, standing alone, would constitute facts sufficient to make its nature "immediately apparent" would be to arbitrarily remove all powdery substances from the protection of the Fourth Amendment *per se*, a result inconsistent with logic as well as the historic and philosophic tenets underlying the Amendment's long history.

There exists in the law today no other conceivable exception to the warrant requirement to justify this search. Therefore, the failure of the government agents to procure a warrant prior to opening the plastic containers, extracting some of the contents and destroying it by chemically examining its composition makes the entire process both an unlawful search and seizure.

CONCLUSION

For these reasons and the reasons stated in the petitioner's brief, *Amicus* respectfully submits that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

JOHN KENNETH ZWERLING
ZWERLING AND MARK, P.C.
108 North Columbus St.
P.O. Box 1929
Alexandria, Virginia 22314
(703) 836-5551

Attorney for Amicus Curiae

DAVID C. LARSON
2223 Wittington Blvd.
Alexandria, Virginia 22308
(703) 360-8357

ON BRIEF

No. 82-1167-CFY
Status: GRANTED

Title: United States, Petitioner
v.
Bradley Thomas Jacobsen and Donna Marie Jacobsen

Docketed:
January 12, 1983

Court: United States Court of Appeals
for the Eighth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Peterson, Mark W.

Entry	Date	Note	Proceedings and Orders
1	Dec 1 1982		Application for extension of time to file petition and order granting same until January 12, 1983 (Blackmun, December 2, 1982).
2	Jan 12 1983	G	Petition for writ of certiorari filed.
3	Feb 14 1983		Brief of respondent Bradley Thomas Jacobsen, et al. in opposition filed.
4	Feb 16 1983		DISTRIBUTED. March 4, 1983
5	Feb 28 1983		DISTRIBUTED. March 4, 1983
6	Mar 1 1983	X	Reply brief of petitioner filed.
7	Mar 7 1983		Petition GRANTED.
			**********
10	Apr 22 1983	G	Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae filed.
12	Apr 22 1983		Order extending time to file brief of petitioner on the merits until May 21, 1983.
13	May 16 1983		Motion of Americans for Effective Law Enforcement, Inc., et al. for leave to file a brief as amici curiae GRANTED.
14	May 23 1983		Order further extending time to file brief of petitioner on the merits until June 10, 1983.
15	May 25 1983		Joint appendix filed.
16	Jun 9 1983		Order further extending time to file brief of petitioner on the merits until June 20, 1983.
17	Jun 20 1983		Brief of petitioner filed.
18	Jun 30 1983		Record filed.
19	Jun 30 1983		Certified original record & C.A. proceedings received.
21	Jul 18 1983		Order extending time to file brief of respondent on the merits until August 29, 1983.
22	Aug 25 1983		Order further extending time to file brief of respondent on the merits until September 13, 1983.
23	Sep 13 1983		Brief amicus curiae of Natl. Assn. of Criminal Def. Lawyers filed.
24	Sep 13 1983		Brief of respondents Bradley T. Jacobsen, et ux. filed.
25	Oct 14 1983		CIRCULATED.
26	Oct 24 1983		SET FOR ARGUMENT. Wednesday, December 7, 1983. (2nd case) (1 hour)
27	Nov 25 1983	X	Reply brief of petitioner United States filed.
28	Dec 7 1983		ARGUED.